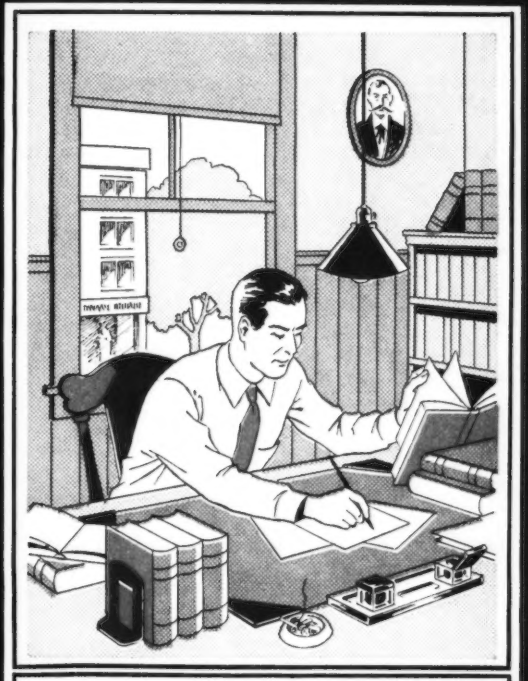
CASE AND COMMENT



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VOL. 45 OCTOBER * 1939 NO. 2

Case and Comment

THE LAWYERS MAGAZINE

Vol. 45 — No. 2

CONTENTS

Established 1894. Published by The Lawyers Co-operative Publishing Company. President, G. M. Wood; Vice-President, T. C. Briggs; Treasurer, A. J. Gosnell; Secretary, E. A. Hale; Editor-in-Chief, G. H. Parmele. Office and Plant: Aqueduct Building, Rochester, N. Y.


Samuel Shaw

LEMUEL SHAW

By CHARLES E. GURNEY[1]

(Condensed from Peabody Law Review, December, 1938)

New England manifests her traditional interest in education and the arts in no way more strikingly than by the development and character of her jurisprudence. It is easy to see how Massachusetts, because of the priority of her settlements, the character of her people, their ideals, their zeal for knowledge and her central geographical position, early assumed leadership. In the presence of such names as Story, Holmes, Brandeis and Shaw, one would, indeed, be audacious to make a selection and say: "Lo! his name leads all the rest."

On this occasion, however, may I present for your consideration:

LEMUEL SHAW

Chief Justice of the Commonwealth from 1830 to 1860, of whom Mr. Justice Holmes declares:

> ". . . The strength of this great Judge lay in accurate appreciation of the requirements of the community whose officer he was; some, indeed many, English Judges could be named who have surpassed him in accurate technical knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all law must ultimately be referred. It was this which made him, in the language of Judge Curtis, 'the greatest magistrate which this country has produced.'"

So far as my reading informs me, Lemuel Shaw, the young Harvard college student was not of remarkably brilliant mind although he did possess a mind of great capacity. He was without a sense of humor, of very serious aspect and principles, reflecting perhaps his birth and formative years in the company of a serious minded father and mother. Graduating in 1800 with honors, a member of Phi Beta Kappa, his College days brought him into association with and enabled him to make the acquaintance of Joshua Bates, later President of Middlebury College, Baldwin, the eminent engineer, Joseph Storey, Jurist, teacher and author of Equity Jurisprudence, the great William Ellery Channing of sainted memory, exponent of the then incipient religious liberalism known at the time as the "Boston Religion," later as Unitarianism.

Graduation in 1800 from Harvard brought the necessity for decision respecting life's vocation and in this young Shaw exhibited that mental quality which helped make him great. His mind was slow but his judgments, while hesitatingly formed, were well founded and were the results of sustained thought and extensive reading. These are the marks of a judicial mind. Upon the Bench, it is said, he never discouraged further enlightening argument.

Shaw turned to teaching but found its duties irksome and declared subsequently that he "worried through" the year. His thoughts then turned to literature, and subsequently to law.

He entered the office of David Everett, a lawyer of Boston, later removing with Mr. Everett to Amherst, New Hampshire, when Everett took up practice in the latter place.

Admission to the Bar at this period of Massachusetts history was almost wholly in the hands of the Bar Associations in the different counties which promulgated rules governing the admission of attorneys and counsellors to the Bar, these rules being announced by the Supreme Court and in harmony with them a minute ap-

[1] Of the Portland, Maine, Bar.

pears upon the record book of Suffolk Bar Association in the Fall of 1801:

> "On motion of Mr. Everett, it was Voted:
>
> That Lemuel Shaw be considered a student at his office from August last."

1804 was the year of Shaw's admission to the Bar as an attorney in the Court of Common Pleas. Opening his office he experienced the usual difficulties of young lawyers whose clients come slowly, and during this period he industriously applied himself to further study of the law. For the first year his total receipts were slightly over two hundred ($200.00) dollars.

The future Chief Justice, early in his professional career, showed a marked civic consciousness of his responsibility for the government in which he lived.

In 1811 he was elected a member of the House of Representatives and by it was chosen one of those to try the impeachment proceedings against James Prescott, Judge of Probate for the County of Middlesex. His adversaries were Daniel Webster and Samuel Hoar and the case naturally attracted public interest to an unusual degree. Webster maintained his position of preëminence in a case of this kind as would be expected, but the closing argument of Mr. Shaw, while devoid of the eloquence of Webster, was clear, forceful, dispassionate, fortified by sound sense, dignified phrasing and impressive presentation.

As an advocate, Shaw was not of outstanding position but his was a day when Rufus Choate and Webster set the standard which all other advocates attempted to emulate. In one case the Court suggested that Mr. Shaw's contention

> "had been urged by the counsel for the plaintiff with as much force as zeal and eloquence without authority can give." (*Wiggin v. Amory*, 14 Mass. 1.)

His practice, however, continually increased and he was counsel in many of the large and important cases presented to the Court, among which was the famous case of *Charles River Bridge v. Warren Bridge*, a case which afterward reached the Supreme Court of the United States. (6 Pickering, 376; 7 Pickering, 344; 11 Peters U. S. 420.)

Shaw took his seat upon the Bench at Berkshire County in 1830. His subsequent career upon the Bench justified the predictions and expectations of his friends. He was a man of character, of large mental capacity, keen perception, with his slowly moving but deliberately accurate mind further restrained by an uncompromising desire to discharge his judicial duties with strict impartiality—qualities in no sense enfeebled or lessened by vanity, love of distinction and popular applause. As we shall see when we study his decisions, the storms of disapproving prejudice beat against the rock but it remained unmoved.

He himself indicates his conception of the duties of a jurist in the eulogy he delivered upon his predecessor, the late Chief Justice Parker:

> "The ultimate object of all laws and of all jurisprudence is to do justice between parties; and the Judge, who, by patient research and persevering investigation, can unravel a complicated case, seek out its governing principles with their just exceptions and qualifications and without violating the rules or weakening the authority of positive law, can apply those principles in a manner consistent with the plain dictates of natural justice, may be considered as having accomplished the most important purpose of his office."

This seems to me the clearest exposition of his own philosophy of the law, that of doing justice between parties, and taken in connection with his other statements of controlling principles of the common law which he sought so assiduously to apply to the relation of men and things as he found them, accompanied by his deep appreciation of the requirements of

the community to which Mr. Justice Holmes makes allusion, all lead to the conclusion that he was perhaps a believer in absolute justice but regarded it as an ideality possibly beyond the attainment of the human mind; and yet his mind, conscious of rectitude, believed that he performed his duty if he diligently sought it for application to human affairs.

His opinions run through 56 volumes of the Massachusetts Reports, beginning in 1830 with the 9th of Pickering and ending in 1860 with the 15th of Gray. The range of legal discussions embraced within these opinions are so diversified that a friendly observer seems justified in his assertion that:

> "Only such subjects as have been developed since his time by changed conditions have not been illuminated by his genius."

In his interpretation of constitutional questions, which would require an extensive and thorough study, but basing my inchoate opinion upon such cases as I have read, I suggest that he walked along the highway of logical thinking nearly abreast, if not side by side, with the great John Marshall.

* * * * * * *

Let us consider one notable decision. In the early common law, cause of action, in cases reported in the early year books, always rested upon *intentional wrong*. It was only at a later day that the action of trespass was extended to embrace harms which were foreseen but which were not the intended consequences of defendant's act. Thence, the question was extended again, to unforeseen injuries. These principles are, of course, the accepted law at the present time and it seems strange to believe that they were formerly so restricted. The early common law, too, was inexorable and held a man responsible for his acts where they resulted in any injury.

> "The early English Common law seems to have imposed liability upon one whose act directly brought about invasion of land in the possession of another, irrespective of whether the invasion was intended, was the result of reckless or negligent conduct or occurred in the course of extra hazardous activity or was *pure accident* and irrespective of whether harm of any sort resulted therefrom to any interest of the possessor. All that seems to have been required was that the actor should have done the act which in fact caused the entry." Restatement of the Law, Subject, Torts, Vol. I, Sec. 166.

> "For every man's land is in the eye of the law enclosed and set apart from his neighbor's; and that either by a visible and material fence as one field is divided from another's by a hedge; or by an ideal invisible boundary existing only in the contemplation of law as when one man's land adjoins another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the law itself specify one general damage. viz.: the treading down and bruising of herbage." Chase's Blackstone, Page 736.

In 1814, a man in Massachusetts, after washing out two guns, went to the door of his shop and discharged one of them for the purpose of drying it, his building being about one rod distant from the highway. At the time of the discharge of the gun, plaintiff's horse, harnessed in his chaise, was fastened by his bridle to the fence on the opposite side of the highway. The horse being frightened by the discharge of the gun, broke away and ran away with the chaise which was thereby greatly injured. After the horse was unharnessed and put into the pasture in the defendant's neighborhood, he discharged another gun, for the like purpose of drying it. The question then presented before the Court was whether defendant was liable under these circumstances. The Court by Sewall, Chief Justice, had no doubt of his liability but considerable doubt whether the action should have been in the form of tres-

pass or trespass on the case. Finally the Court said this:

> "The party injured either in his person or property by the discharge of a gun, even when the act is lawful, as at a military muster and parade and under orders of a commanding officer, is entitled to redress in a civil action to the extent of his damage."

What court would render such a decision today? The case is reported in *Cole v. Fishe,* 11 Mass. 136 (1814). Such was the State law.

Observe no question of defendant's negligence, default or unlawful act appears in the case in any way. The old law of trespass or case was effective and required response in damages resulting from the consequences of one's act. This law would be intolerable in a modern civilization. The matter again came before the Courts of Massachusetts and with his usual scholarship and learning the Chief Justice met it. In *Brown v. Kendall,* 6 Cushing, 292, decided in 1850, the facts were these:

Two dogs belonging respectively to the plaintiff and defendant were fighting in the presence of their masters. The defendant took a stick about four feet long and commenced beating the dogs in order to separate them; the plaintiff was looking on at a distance of about a rod and he advanced a step or two toward the dogs. In their struggle the dogs approached the place where the plaintiff was standing. The defendant retreated from the dogs striking them as he retreated and as he approached the plaintiff with his back toward him, in the raising of his stick over his shoulder in order to strike the dogs, he suddenly hit the plaintiff in the eye, inflicting upon him serious injury. Whether it was necessary or proper for the defendant to interfere in the fight between the dogs; whether the interference, if called for, was in a proper manner and what degree of care was exercised by each party on the occasion were the subject of controversy between the parties. The defendant requested the Judge to tell the jury that:

> "If both the plaintiff and defendant at the time of the blow were using ordinary care, or if at that time the defendant was using ordinary care and the plaintiff was not, or if at that time both plaintiff and defendant were not using ordinary care, then the plaintiff could not recover."

Defendant further requested Judge to ask jury that:

> "If the defendant was using ordinary care and the plaintiff was not, plaintiff could not recover."

The Court now introduces the doctrine of Ordinary Care required of the defendant and says:

> "We have no doubt that the act of the defendant, in attempting to part the fighting dogs one of which was his own and for the injurious acts of which he might be responsible was a lawful and proper act which he might do by proper and safe means. If, then, in doing this act, he used due care and all proper precautions necessary to the exigency of the case, to avoid hurt to others, in raising his stick for that purpose, he *accidentally* hit the plaintiff in his eye and wounded him, this was the result of pure accident and was involuntary and unavoidable and therefore, the action would not lie. . . . If the act of hitting the plaintiff was unintentional on the part of the defendant and done in the doing of a lawful act, then the defendant was not liable, unless it was done in the want of exercise of due care, adapted to the exigency of the case, and therefore such want of due care became part of the plaintiff's case and the burden of proof was on the plaintiff to establish it. . . . If it appears that the defendant was doing a lawful act and unintentionally hit and hurt the plaintiff, then, unless it also appears to the satisfaction of the jury, that the defendant is chargeable with some *fault, negligence, carelessness or want of prudence,* plaintiff fails to sustain the burden of proof and so will not be entitled to recover."

The most spectacular case and one most often quoted now is the famous murder trial of Professor Webster of Harvard College.

Professor Webster was a great friend of George Parkman, a very wealthy

man of Boston, aristocratic, the possessor of many idiosyncracies. Professor Webster, teaching chemistry at Harvard College, had been the editor of numerous publications and was well known and respected in the community as was his friend, Parkman, through whose influence, to some extent, he obtained the appointment at the College. Webster had become financially embarrassed, perhaps through too great engrossment in his work or through lack of business acumen, so that he borrowed from Parkman something over $2400.00, giving a note secured by mortgage of all his property, including his cabinet of rare minerals. He then gave a second mortgage upon his property without informing Mr. Parkman and Parkman demanded payment and became very insistent, threatening attachment of Webster's property. Webster made an appointment for Parkman to call at the Medical College at 1:30 the next afternoon, then and there to receive payment of the note. Parkman called and all subsequent trace of him was lost. Professor Webster acknowledged having received the call and declared that he had paid Parkman off and that Parkman had immediately left the University. No one presently suspected Webster and wide search was made for Parkman. Anonymous letters were received by the police suggesting different solutions and after a week's hunt, when no evidence had been found of the missing man, people began to notice that Webster stayed at the Medical College much longer than he was accustomed to do. The doors to his laboratory were securely locked and delay occurred in opening them in response to knocks. Water had been heard running for an unusual length of time; fires were constantly maintained in the laboratory furnace. People began to suspect Webster and the janitor of the building explored the contents of a private vault in Webster's apartment by penetrating the brick wall which enclosed it. Working in secret, with his wife standing by to guard him, the janitor finally broke through the wall and discovered a portion of a human body suspended from above by fish hooks. Webster was immediately arrested. Indictment was returned and he was brought to trial in the old Court House on Court Street. The prominence in the community of both parties, the attending mystery, the ghastly discovery, created tremendous public interest all over the country. It is said that one of Webster's friends urged Webster to secure the services of Rufus Choate as defending attorney and it is also said that Choate was requested to make the defense but refused, saying that he had advised Webster to plead guilty to homicide and defend on the ground that the killing was no more than manslaughter on which basis Choate would defend. Choate also thought that the theory of defense should immediately be made public to allay public suspicion. Choate had been very successful in murder cases and it is believed that had Webster followed his advice Choate could have secured a verdict of manslaughter.

The law at the time required that a capital trial should be held before three or more Justices of the Supreme Court,—the number which at that time constituted a majority of the Court, thus getting a final decision upon questions of law. At the time of the trial the full Court sat with the exception of Mr. Justice Fletcher, and the Chief Justice was attended by Associate Justices Wilde, Dewey and Metcalf. Attorney General Clifford, assisted by Mr. George Bemis as Special Counsel, appeared for the Commonwealth, while Webster was defended by Messrs. Sohier and Metcalf. The trial continued for eleven days and at the end of the trial Webster

was found guilty and was subsequently hanged, in 1850. The charge of the Chief Justice has probably been used in part in almost every murder trial since that time and in it we find quotations which every law student has known from his student days. With memorable diction he defines murder, manslaughter, malice aforethought and reasonable doubt. An excerpt from the opinion indicates its clearness:

> "Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not merely possible doubt; because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of a case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to moral certainty of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof, there is reasonable doubt remaining, the accused is entitled to the benefit of it by acquittal, for it is not sufficient to establish a probability, though a strong one arises from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it." *Commonwealth v. Webster*, 5 Cushing, 320 (1850).

It was to be expected that numerous questions would arise during the trial but one statement of the Court has excited some comment and criticism. After defining murder and manslaughter and explaining the meaning of malice aforethought, the Chief Justice adds these words:

> ". . . The implication of malice arises in every case of intentional homicide; and, the fact of killing first being proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily established by the party charged, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it. If there are, in fact, circumstances of justification, cause or palliation, such proof will naturally indicate them, but where the fact of killing is proved by satisfactory evidence and there are no circumstances disclosed tending to show justification or excuse, there is nothing to rebut the natural presumption of malice. This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and wilfully does, in fact, do, and that he himself intended all the natural, probable and usual consequences of his own act."

It was suggested that this rule cast upon the defendant the burden to show circumstances by the preponderance of evidence; that he must prove a fact, while in truth all that is necessary to entitle him to acquittal is a reasonable doubt as to any of the necessary elements of the crime, including in case of murder, the element of malice.

The Chief Justice's words were doubtless drawn from *Commonwealth v. York*, decided in 1845, 9 Metcalf, 93. Personally, I am not qualified to discuss the point, but the case has received the approval of subsequent judges so many times that I assume the criticism or suggestion may finally be analyzed as refinement of expression. I was, however, interested in the suggestion that where one assails another violently with a dangerous weapon or acts in a cruel manner, that in the absence of proof to the contrary, presumption of malice exists. In other words, my attention was arrested by the thought that violence, especial cruelty or the use of some dangerous weapon justifies the inference of malice aforethought. A very limited research disclosed Bishop's comment in the ninth edition of his work, Section 429, to be as follows:

> " 'Malice aforethought' is a phrase transmitted to us from the old statutes of Mayhem and thus it left to murder the higher forms of felonious homicide and left the

lower to be termed as they afterwards were, 'manslaughter'! . . . The meaning of these words is not precisely the same which would be given them if employed for the first time in modern statutes. They appear in a statute as far back as 1389. . . . 'He that doth a cruel act voluntarily, doth it with malice propensed . . . if one doth such a mischief on a sudden, that is malice propensed, for' said Lord Coke, 'if it be voluntary, the law will imply malice.' "

It is interesting that many of his decisions were not sustained by cited authorities owing, doubtless, to his great familiarity with the law and his belief that the principles were so well established as to stand by their own strength. Lawyers all over America, text book writers and legal scholars quote his opinions as if they were matters of finality.

His personal life was unblemished and conscious of rectitude, aware that he had served his Commonwealth faithfully, in his eightieth year, soon after his resignation from the Bench, he entered the Higher Life.

In an inspired moment, the prophet Micah asks this question, applicable, I believe, to Lemuel Shaw:

"WHAT DOES THE LORD REQUIRE OF THEE BUT TO DO JUSTLY AND TO LOVE MERCY AND TO WALK HUMBLY WITH THY GOD?"

PRINTERS' ERRORS

You have heard that while the lawyers' mistakes are behind stone walls and safely locked away from the world's eyes and the physicians' errors are buried, those errata made by the hapless wights in the mailadvertising business are permanently displayed in type for all to note.

Being human, we have, in our time, been guilty of typographical errors. The only comfort we can take is that on such occasions we have always made prompt and unhesitating adjustments to the full satisfaction of our customer.

We have just been told of the penalties which in past centuries have been levied against Bible printers who have made typographical mistakes. "Adjustments" to their kingly customers usually meant imprisonment or death!

DeVinne reports that in an early London edition of the Bible the printer set Genesis III: I-VI: "He shall be thy fool" instead of "He shall be thy Lord." The printer was beheaded.

The 1361 edition of the Bible printed by Robert Barker in London—and known as the Wicked Bible because the word "not" was omitted from the Seventh Commandment—brought a heavy fine. This edition with: "Thou shalt commit adultery," was, perhaps justifiably, suppressed.

We do not know what happened to the printer of the Bug Bible. Instead of "terrors by night" in the 91st Psalm the printer set: "Thou shalt not need be afraid for the bugs by night."

The printer of an 1800 edition sums it all up by setting a passage in Psalms CXLX to read, instead of "Princes," "Printers have persecuted me without a cause."

—Postage Stamp.

THE LIFE OF A MILLIONAIRE

(Extracted from the case of Texas v. Florida, — U. S. —, 83 L. ed. (Adv. 549), 59 S. Ct. 563, 121 A.L.R. 1179)

EDWARD GREEN was born in England August 22, 1868, and was in his sixty-eighth year at the time of his death, June 8, 1936, at Lake Placid, New York, where he was temporarily sojourning for reasons of health. He was the son of Hetty Green a well-known figure in the financial world, who was born in New Bedford, Massachusetts. Her forebears had resided in that vicinity since the seventeenth century, and Green and his sister Mrs. Wilks inherited from her one hundred and thirty acres of land in the town of Dartmouth, which had been the family home and had been property of the family for some two hundred years. The foundation of the family fortune had been laid in the whaling industry, centering at New Bedford. At her death his mother left an estate of $67,000,000, which, under her will, became the property of decedent and his sister in substantially equal shares.

His education was in the public schools of Vermont and New York, and for two years he attended Fordham University in New York City. His tastes were not artistic or literary; he had a deep interest in scientific study and experimentation, especially in the fields of astronomy, geology, electricity, photography, radio and aviation. He was fond of the sea and of yachting, and until a serious illness in 1921, followed by permanent impairment of his health, he was interested in athletics and outdoor life. After that time he became especially interested in collecting stamps, coins, currency, and jewels, to which he devoted much attention. He had no interest in fashionable or social life, but preferred, as he stated, associating with the common man or "the man in the street."

In 1892, when he was twenty-four years old, his mother sent him to Texas to foreclose a mortgage on a short line of railroad located there, later known as the Texas Midland Railroad. As the result of the foreclosure she acquired the railroad, and for the larger part of Green's time until 1911 he remained in Texas for the purpose of looking after the management of the road. In that year he returned to live in New York at the urgent request of his mother, who, because of failing health, desired his assistance in the management of her business affairs.

From 1911 until 1921 Green customarily made two trips a year to Texas, one to attend the annual meeting of the railroad and the other to inspect the road, and in alternate years to vote in Terrell, Texas, in state and municipal elections. From 1922 to 1927 he made but one annual visit, in the spring of each year. After 1923 he spent only two or three days on each visit to Texas, in Terrell and its vicinity. In the years 1924 to 1927 he visited Marlin, Texas, where he remained for about a month each year for purposes of medical treatment. In 1928 the railroad was sold. After the agreement for sale was made in 1927, he made no other visit to Dallas or Terrell, and his only visit to Texas was in 1935, for treatment at a clinic in Marlin.

During the period of his residence in Texas, decedent was a bachelor and maintained domestic establishments at various places. He at first lived in a hotel. About 1894 he maintained a bachelor apartment at Terrell. For a time he also kept rooms at a hotel

in Dallas and then about 1896 or 1897 leased an apartment in that city. Later he purchased a building there which he remodelled and occupied as a dwelling until 1911, when the building was sold. After that he caused a friend to rent a room for him in Terrell, Texas, admittedly for the purpose of preserving his right to vote in Texas. The room was never occupied by him nor were any of his possessions sent there, except a box containing a pair of trousers and a vest. He also owned a two hundred acre experimental farm near Terrell where there were living quarters which he occasionally used. The farm was afterwards sold, and from 1911 on he had no dwelling place in Texas except his private railroad car, which was sold with the road in 1927–1928. Upon his removal to New York in 1911 all of the best furniture in the Dallas residence was packed and shipped to New York for use in his dwelling there. His library of books on scientific subjects was given to the Dallas Public Library. At the time of his death his only real property in Texas consisted of some unsaleable lots pertaining to the railroad which were appraised at $2,200.

During the period of his residence in Texas, aside from his active interest in the management of the railroad he became interested in scientific and farm experimentation. He also became active in Texas politics, was a Texas delegate to the Republican National Convention at St. Louis, and became Chairman of the Republican State Executive Committee, serving in that capacity for four years, and upon re-election until 1900. In 1906 the nomination for Governor of Texas on the Republican ticket was offered him, but he declined the nomination upon the insistence of his mother. He was appointed a colonel upon the Texas Governor's Staff and served in that capacity until January, 1915. Prior to 1911 and until 1920 he voted in Texas in state and national elections.

Green frequently expressed himself as being attached to the state and to its people. With few exceptions and in substantially all deeds, papers, and legal documents he described himself as of Terrell, Texas, and instructed his secretary and office manager and his attorneys in New York, Massachusetts, and Florida, to mention in all important legal documents that Terrell was his legal residence. He continued this practice until 1935. In his will, executed in 1908, in his application for a marriage license in 1917, and in the probate proceedings connected with his mother's estate, 1916–18, he was described as of Terrell, Texas. In 1922 he declined to consider running for Congress in Massachusetts because he claimed to be a resident of Texas. In 1929 he stated he would not be available for appointment as Federal Radio Commissioner from New England because he was a former Republican National Committeeman of Texas and spent only the summer months in New England. In 1935 he testified under oath in Florida that his residence was Texas, with a winter home in Florida and a summer home in New Bedford. In that year he returned to the Texas Centennial Committee a certificate which described him as of Massachusetts, with the statement: "I have never changed my legal residence from Terrell, Texas."

If declarations were alone sufficient to establish domicile, the record would leave no doubt that Green was domiciled in Texas until the time of his death. But in this connection it should be noted that Green never paid an income tax or a personal property tax on intangibles in any state, and the Special Master was of opinion that the desire to avoid taxation was a controlling motive for

Green's repeated declarations that he was a resident of Texas long after he had ceased to have an abiding place or any active connection with affairs in that state.

In July, 1911, Green removed his household belongings to New York City, where he established his dwelling place in a house at 5 West 90th Street, which was owned by the estate of his grandfather and adjoined a house occupied by his mother. He opened an office in New York City, which remained his business headquarters until his death, and with his mother maintained a joint office in her residence. When Green came to New York his mother settled upon him, as his own, property valued at $500,000. Upon her death in 1916 he became entitled to an interest in the estate of his grandfather aggregating $4,500,000, and under the will of his mother he became entitled to the income of one-half of her estate for a period of ten years, when he received one-half of the principal, aggregating about $33,000,000.

Following his mother's death he was married, on July 10, 1917, to Miss Mabel Harlow. The following winter they removed from the 90th Street house to an apartment in the Waldorf Hotel, where they lived when in New York until the hotel was demolished in 1921. Then they removed to the Sherry Netherlands Hotel, where they rented and used a large suite. He at first took a two-year lease on the apartment, but from May 1, 1931, the rental was continued on a monthly basis. The apartments were furnished by the hotels; decedent's furniture, pictures, and personal belongings, much of which he had brought from Texas, remained at 5 West 90th Street until 1921, when most of them were removed to decedent's place at Round Hills, Massachusetts. In 1928 the remainder was sent to Round Hills and the New York house demolished.

During the last ten years of his life his apartment in New York was used only as a temporary stopping place on his trips north and south. At his death the family belongings in the apartment consisted of some of his mother's letters, a portion of his stamp collection, his interest in which had been slight since 1927, some clothing of Mrs. Green's, and a few personal belongings worth less than $1,000. His tangible personal property in New York at the time of his death consisted principally of his collection of jewels, coins, currency and stamps, having an aggregate value of $1,583,-221.

Green never registered or attempted to vote in New York. In 1916 he was assessed there for personal property taxes, but the assessment was cancelled upon his submission of affidavits declaring that his legal residence was in Texas. To the suggestion of a friend made in 1917 that he build a home on Long Island, he replied that he did not want to do so as he did not wish to pay taxes in New York. And later he stated that he desired to build on his mother's place at Round Hills in Massachusetts. During the period from 1911 to 1921 he was active in business affairs in New York. He managed his own fortune, which amounted to approximately $6,000,-000 after his mother's death. He also assisted in managing her extensive business interests and after her death was actively engaged as executor and trustee in looking after her large estate, including several family-owned holding corporations. Decedent became a director of a New York National Bank and a director of two important trust companies and regularly attended their meetings and participated in their affairs until about 1921. He maintained large deposit balances in New York banks; his personal securities were kept in safe deposit vaults there. He did not enjoy New

York life and sometimes expressed dislike of its people and business practices. After his illness in November, 1921, all his activities there ceased. He never thereafter attended trustees' or directors' meetings, or went to his New York office.

After his marriage in 1917 Green spent a part of the summer near Round Hills, Massachusetts, in the vicinity of Dartmouth, which was the property he had inherited from his mother. On his first visit on a yachting trip in 1917 he determined to develop the property into a large country estate and build there an imposing residence. With that in view and with the consent and approval of his sister he began to develop the property in the fall of that year by clearing the land, constructing breakwaters, wharves, water tanks, pumping plant, greenhouses and workmen's cottages. From then until 1921 development of the property was his principal interest and occupation. While the work was going forward decedent spent much time on his yacht or at a hotel in the vicinity. In July of 1921 the house was ready for occupancy, and from then until shortly before his death he spent more time there almost every year than at any other place, usually coming to Round Hills immediately after July 1st, evidently because taxes were assessed as of that date, and remaining just short of six months each year.

Between 1917 and 1926 Green expended on the Round Hills estate in excess of $6,688,000. To the land inherited from his mother he added by purchase one hundred and forty adjoining acres. The house was large and imposing—indeed, somewhat "institutional" in appearance, there having apparently been some thought, which he never carried out, of converting it into an institution as a memorial to the Green and Howland families after his own and his sister's death. Upon the property were some sixty structures, including the usual outbuildings of a large country estate, swimming pools, tennis courts, radio broadcasting stations, an airport, airship hangar and dock. The house was designed as a commodious residence, with carefully planned accommodations for family, guests, and for a full complement of servants.

Special furniture was designed for the house, but furnishings from 5 West 90th Street in New York were also brought to it, including family possessions and heirlooms, two oil portraits of his mother, another of his grandfather, personal collections of prints and engravings of whaling ships and scenes, and framed certificates of his membership in various historical societies. Green assembled there a well chosen library of miscellaneous and scientific books, including many rare volumes on the history of New England and accounts of the whaling industry, on which the family fortune had been founded. In a vault in the basement was assembled a substantial part of his collection of jewelry, coins, and stamps.

In the social life of the countryside he took no part, but he associated freely with employees and tradesmen and visitors interested in scientific research. He developed on a large scale his interest in various scientific activities, especially photography, radio, and aviation. A number of his buildings and radio facilities were placed at the disposal of the Massachusetts Institute of Technology for experimental purposes, and he contributed his own funds to the cost of experiments. On his property he established an airport and a school for aviators. He arranged to have the "Charles W. Morgan," an old whaling ship, transferred to Whaling Enshrined, Inc., to which he gave a strip of the shore at Round Hills where he established the vessel and maintained

it as a museum which he kept open to the public. His grounds and bathing beach were also opened to the public, members of which visited them in large numbers.

Owing to his failing health most of these activities, though not his interest in them, were curtailed during the last three years of his life, but he continued to spend most of the summer and the early fall at Round Hills until the year of his death, and all of his personal and intimate belongings remained there. He told a friend that he hoped to be there when he died; and his remains were brought there from Lake Placid for the funeral service. Green never voted in Massachusetts or openly acknowledged Round Hills as his legal residence, invariably giving as his reason that he wished to avoid paying taxes there. When a demand was made upon him by Massachusetts officials for payment of income tax in 1928, he declined to file a return on the ground that his legal residence was Terrell, Texas. No income or personal property tax on intangibles was paid by him in Massachusetts.

In 1923 he was advised by his physician, following an operation and illness, to go to Florida. He spent the following winter there in hotels or upon boats in the vicinity of Miami and Jacksonville. In April, 1924, he bought land on Star Island, near Miami Beach, and began landscaping work and construction of a dock. In January, 1925, he returned to Miami Beach, living on a houseboat near Star Island for about three and a half months. While there he purchased additional lots and began the construction of a dwelling.

Part of the following winter was spent on his houseboat near Star Island, and the house was finally completed and occupied as a winter residence in 1927. In the following years, until his death, he spent about four and a half months each winter at Star Island, between January and May. The house, costing over $600,000, was fully equipped as a winter residence, with ample accommodations for family, guests, and servants. His total expenditures there amounted to about $1,500,000. The house was furnished with new specially made furniture, and it contained, with negligible exceptions, no pictures, books, furniture, or mementos of intimate personal or family association. As in his other places of residence, he took little part in the social life of the community. In Florida he never carried on any of the activities or experiments with which he had occupied himself in Texas or Massachusetts. His life in Florida was typical, on the whole, of a semi-invalid seeking health there during the winter months. He busied himself for the most part with automobile rides, cruising in near-by waters, and in working on his collections, parts of which he had brought with him from Massachusetts.

Green occasionally spoke to friends of Florida as his home, saying to one: "This is my home and I expect to live here the rest of my days." He never voted in Florida or paid intangible property taxes there, although subject to such taxes if a resident; in 1933 he declared to the local tax assessor that his legal residence was in another state. In 1931 and again in 1933 he was advised by a friend to change his legal residence from Texas to Florida because of pending tax legislation in Texas. His attorney suggested that as he had a residence in Florida it would only be necessary to make announcement of his intention. But he took no such action and in March of 1935 testified in a judicial proceeding in Florida that Texas was his legal residence.

The four persons nearest to decedent in life, his wife, sister, his office manager, and his secretary, were able

to throw little light on his purposes and intention with respect to his domicile. Mrs. Green, who was a party to the present suit, asserted by her answer that Texas was the domicile of herself and her husband. After settlement with Mrs. Wilks, the sister, of her claims upon the estate, the suit was discontinued as to Mrs. Green. There is nothing in the record to indicate that she has since claimed or resumed her domicile in Texas. On the contrary, she remained at Round Hills for six months after Green's death. The Special Master concluded that her position with reference to her husband's domicile was influenced by the advantages which might accrue to her from the community property laws of Texas. The sister, by her answer in this case as well as in the New York proceeding where she claimed under her brother's will, in which he declared Texas to be his legal residence, denied that her brother was a resident of Texas, and in this proceeding she asserts that his domicile at the time of his death was in Massachusetts. Neither his wife nor his sister has given any evidence to explain the inconsistency between Green's declarations and his actions or the conflict between themselves upon the issue of domicile. All decedent's books and papers were made available by his office manager, who testified that from the inception of their business association in New York until decedent's death, he claimed Texas as his legal residence and gave instructions that in all formal documents his permanent residence be stated as Texas. His secretary testified to the same effect. Neither was able to give any intimation of the real intention behind decedent's declarations and actions except what may be inferred from his evident desire and frequently announced purpose to escape or minimize taxes.

NOTHING NEW UNDER THE SUN

THE following quotations from a decision in 1568 concerning the great length of pleadings, in which the Chancellor observed:

"that the said replication (i. e., the pleading) doth amount to six score sheets of paper and yet all the matter thereof which is pertinent might have been well contrived in sixteen sheets of paper . . ."

and gave order

"that the Warden of the Fleet shall take the said Richard Mylward (the culprit pleader) alias Alexander into his custody and shall bring him into Westminster Hall on Saturday next about 10 of the clock in the forenoon and then and there shall cut a hole in the midst of the same engrossed Replication which is delivered unto him for that purpose, and put the said Richard's head through the same hole, and so let the same Replication hang about his shoulders with the written side hanging outward, and then, the same so hanging, shall lead the said Richard bareheaded and barefaced round about Westminster Hall whilst the Courts are sitting, and shall show him at the Bar of every of the three Courts within the Hall, and then shall take him back again to the Fleet, and keep him prisoner until he shall have paid £10 to her Majesty for a fine and 20 nobles to the defendant for his costs in respect of the aforesaid abuse."—*Dicta, Jan. 1938.*

SIMPLE SIMON'S STILL PIG

By CHESTER A. GROVER[1]

SIMON SIMPSON sat in young Attorney Risdon's office in Velvet City with his face buried in his hands and his tawny, unkempt hair hanging down like the fore-top of one of his skinny old horses.

"Nellie was my best Berkshire hog—my pet, Mr. Risdon," Simon blubbered, "and that there constable with Mr. Murphy's feed bill chased her all over the lot and got her so het up that she died on the way back to town."

"But the constable must have had some court writ," broke in the young counsellor.

"No he didn't have no paper at all—"

"Mr. Murphy, it seems to me Simon is right. The officer had no writ, or any right to seize that hog."

"He didn't need any, Risdon," responded County Commissioner-Feed Dealer Murphy, "Simon gave up that hog voluntarily and the constable even gave him three dollars for hauling it to town."

"That ain't so, Mr. Risdon,—"

"But how did your constable come to go on this man's farm without any writ, Mr. Murphy? He certainly had no right to seize that—"

"An' Nellie was my best Berkshire hog—my pet, Mr. Risdon," whimpered Simon, "an' I didn't have no heart to kill her Christmas time, an' she was goin' to have—"

"Well, let's get it over with," interrupted the County Commissioner, "I'll allow Simon on his bill full weight for his dead hog even if it did die."

"No, Mr. Murphy, don't be so hard on a poor rancher—I'll settle if you call your bill square, or Mr. Risdon will have to take it to court an' you wouldn't like to be sued for no dead hog, just before election," urged the bereaved owner of the deceased porker.

"All right! *All right!* I'll call the bill square. You couldn't stick me for a cent, but I guess this is a dead horse as well as a dead hog—"

"An' you'll let me keep the hog, Mr. Murphy. I couldn't no how cut up poor Nellie, but I could get the butcher to do it for me and I could feed her to—."

"Keep your dead hog and be damned, Simon."

No sooner had County Commissioner-Feed Dealer Murphy departed from the Risdon office than Simon raised his drooping head and anxiously inquired, "What're you goin' to charge me, Mr. Risdon, now don't be too hard on a poor rancher."

"Fifteen dollars, Simon."

"Make it twelve dollars and fifty cents, Mr. Risdon."

"All right, Simon, but cash."

"Yes, Mr. Risdon," said Simon as he fished out the money from his dirty old pocketbook, "but I had an awful hard time in this here case. Worst of all, was gittin' that there constable to pick out the right hog—the one that was sick so long—poor Nellie, she almost died when he was a tryin' to catch her, and poor Nellie only lived until—"

[1] Copyright by Chester A. Grover (1939).

FROM A GEORGIA PAPER

John H. P---- announces to friends and enemies alike the reopening of his law office; following a usual life-long custom of giving and taking a square deal.

A EUROPEAN VIEWS THE FUTURE OF INTERNATIONAL LAW

EUGENE KLINE, DR. JUR.[1]

OLD Grotius would certainly consider our time the continuation of the darkest and most barbaric epoch of the migration period. His wonderful ideas about the proper political intercourse between states, and the legal foundation thereof, seems to be now as utopistic as the strict enforcement of the ten commandments by our police courts. As to the League of Nations Covenant: its practical value for a student of jurisprudence will soon equal the glorious laws of King Hammurabbi. To appreciate fully these facts about the present situation of the International Law, it is interesting to remember that one of the most important obligatory subjects in every European Law School was (and ironically: still is) International Law. An American law student cannot imagine what worries meant to his European colleagues to pass the International Law examination to obtain his law degree. The examiners (usually former diplomat-experts, members of numberless international tribunals and commissions) required an off-hand knowledge of a multitude of dates, names, facts of the history of international relations. But the most important part of such an examination was considered the questions concerning minute details of the post-war treaties and, of course, the Covenant. They had to be *memorized* in the fullest sense of the word. To be able to recite them by heart as a bed-prayer. Just like that. Needless to say, that the best international jurists (in the scholastic sense) have always been the Germans and Italians. Now the new German lawyer-statesmen have probably an exceptionally good time to scrap those treaties, and particularly the Covenant, not only as a part of the ignominious Versailles Treaty, but as well because of their reminiscences.

Of course, these sources of the post-war international law from the beginning were really seriously taken only by the small nations, their security and existence depended on them. In Czechoslovakia they enjoyed an equal respect with the Constitution. At least. Also probably in Albania. . . .

How far can this scrapping of the International Law go? As to the Fascist states, the supreme law of the land is the dictator's word, expressing the economic and political interests of their neo-feudal social order. Therefore, naturally, there is no place for a legal system which is based on democratic, peaceful, and friendly relations between civilized nations, as it is supposed to be in the case of the International Law. The great Democracies are busy enforcing their passport requirements and immigration laws.

Apparently, the argument of the previous decades: whether or not the International Law is superior to the laws of the individual countries could be easily determined now—a "jus gentium" without magistrates giving and enforcing its principles has no reson d'être today! Of course, this is only seemingly true. Every student of history knows that the eternal principles of natural law and justice never die. Suppressed for a time, the spark forever remains for rekindling. And in the long run, it will be confirmed again the ever-returning truth: that the real standard of civilization of any nation is expressed by its stand on the question of the minority rights.

[1] Graduate lawyer of University of Prague, Czechoslovakia, now attending Duquesne University Law School, Pittsburgh, Pa.

AMERICA AND THE FATE OF DEMOCRACY

By GEORGE R. FARNUM[1]

We call our Constitution a democracy because its working is in the hands not of the few but of the many.
PERICLES—FUNERAL ORATION.

A republic is undeniably the most rational form of government for free men.
RICHARD COBDEN.

WITH all its shortcomings the democratic state is the highest political achievement of civilization. Though Aristotle characterized man as a political animal, it is only among people who have reached a certain standard of intelligence and an advanced degree of moral responsibility and self-reliance that popular rule can be organized and maintained. It has never been established except by a nation of what General Smuts described as "sturdy, independent-minded, freedom-loving individuals." Liberty, the aim and fruit of democracy is, as Emerson stated, "an accurate index, in men and nations, of general progress."

In modern times America has been the great proving ground of democratic institutions. As Emerson pointed out, "It was opened after the feudal mischief was spent and so the people made a good start." From that auspicious start a great and free nation was developed on the foundation of that Constitution which Balfour once characterized as "one of the greatest pieces of constructive statesmanship ever accomplished."

In the old world today democracy is fighting desperately for its very existence. The outcome of that struggle—whether the issue is decided on the field of battle or otherwise—will be a matter of vital importance to America. If freedom is dimmed or extinguished across the sea, she will stand alone as the hope of humanity for the return of a better day. In this critical hour, for every American who is loyal to his country and proud of its mission, the words of Jefferson, though uttered more than a century and a quarter ago, will still carry a warning of momentous import—"Our duty to ourselves, to posterity, and to mankind, call upon us by every motive which is sacred or honorable, to watch over the safety of our beloved country during the troubles which agitate and convulse the residue of the world."

[1] Of the Boston Bar and Former Assistant Attorney General of the United States.

THE CRITIC REPROVED

"I WAS *once on a visit at the house of a lady for whom I had a high respect," said Dr. Samuel Johnson one day to his friend, James Boswell. "There was a good deal of company in the room. When they were gone, I said to this lady, 'What foolish talking have we had!' 'Yes,' said she, 'but while they talked, you said nothing.'*

"I was struck with the reproof. How much better is the man who does anything that is innocent than he who does nothing."—From Boswell's "Tour to the Hebrides."

THE CHARACTER OF A SOLICITOR IN 1675

THE following extract from a pamphlet, dated 1675, illustrates the reputation in which solicitors as contrasted with attorneys were then held:

"A solicitor is a pettifogging sophister, one whom by the same figure that a North Country peddler is a merchant man, you may style a lawyer. List him an attorney, and you smother Tom Thumb in a pudding. The very name of scrivener outreaches him, and he is swallowed up in the praise, like Sir Hudibras in a great saddle. Nothing to be seen but the giddy feathers in his crown. Some say he's a gentleman, but he becomes the epithet as a swine's snout does a carbuncle; he is just such another dunghill rampant. The silly countryman (who seeing an ape in a scarlet coat, best (sic) his young worship and gave his lordship joy) did not slander his complement with worse application than he that names him a law giver. The cook that served up a rope in a pye (to continue the frolick) might have wrapped up such a pettifogger as this in his bill of fare. He is will-with-a-wisp, a with whither thou woo't. Proteus has not more shapes than he can perform offices. He can instruct with the counsellors, plead as an attorney; he has all the tricks and quillets of an informer, nay, and a bum too, for a need—in a word, he is a Jack-of-all-trades, and his shattered brain, like a crackt looking glass, represents a thousand fancies. He calls himself Esquire of the Quill, but to see how he tugs at his pen, and belaboureth his half-amazed clyents with a cudgel of cramp words, it would make a dog break his halter. The jugling Skip Jack being lately put to his last shift, has metamorphosed a needle into a goose feather, and the sole of an old shoe into a sheet of paper, for the best of his profession have been forlorn taylors, outcast brokers, drunken cobblers, or the offspring of such a rabble rout. He hugs the papers as the devil hugg'd the witch, for they are an advancement of his science, these frisk about him like a sworm of bees, yet he is a man of vast prictice if he has but half a score of 'em. If his lowsie clyents chance to recover an old rotten barn or a weather-beaten cottage, he will be sure to have two-third parts for a quantum meruit. He is Lord Paramount among the shifting baliffs, and a sworn brother to the marshall men, and is behind none of them at the extortive faculty, having the confidence to demand item for his pains and trouble, when all the while he does nothing but hover over a quart pot. He is as offensive to the attorneys as flies are to a galled horse, and whereas their ne plus ultra is ten groats, Mr. Solicitor forsooth claims double fees with authority, and if the clyent prove so saucy to deny it, he will rage like Tom of Bedlam, but if that will not prevail he'll cast a squeezing look like that of Vespasian. . . . In the society of true and genuine lawyers he is like an owl among so many lapwings, and is no more fit to converse with them than a hogherd is to preach a sermon or a cinder-wench to wait upon a countess. . . . He writes a bill of costs in such worm-eaten characters that 'tis past the skill of a Rosicrucian to discover the apocaliptical meaning, yet for all that he will not abate you an ace of the summa totalis, and that, to be sure, shall be plain enough. Wherefore, he may very fitly be called the

inquisition of the purse . . . and more than that, he scorns to cheat you in hugger mugger, but will not fail to do so before your face. He is like the man that cried, Any tooth good barber, rather than stand out for a wrangler, if he can pump no chink out of you. He will manage your cause for a breakfast, being a notable artist at spunging. Oh! He's a terrible slaughter man at a Thanksgiving dinner. He outshines a bailiff in all his cheating faculties, and I know none outstrips him except his infernal grandfather. In fine, he is the yeoman's horseleech, the gentleman's rubbing brush, and the courtier's quid pro quo. He is the summum bonum of knavery; in judgment a meer pigmy; in shew the beard of a demi-blazing star. To be brief, he is like a lamp without oil, a trumpet without sound, a smoak without fire, a fiddle out of tune, or a bell without a clapper; and differs from a lawyer as a shrimp does from a lobster, a frog from an elephant, or a tom-tit from an eagle."

PIG'S WHISTLE

Extracted from Grinnell Bros. v. Asiuliewicz, 216 N. W. 388, 241 Mich. 186.

BILL by Grinnell Brothers against Anthony Asiuliewicz and others to enjoin an interference with quiet enjoyments under a lease. From a decree for plaintiff, defendants' appeal affirmed.

Wm. L. January and Arthur J. Adams for plaintiff.

Jos. B. Beckenstein, for defendants.

WIEST, J. Defendants Asiuliewicz owned a building, on Michigan avenue in the city of Detroit, in which they conducted a high-grade furniture store. In July, 1922, they leased certain space in the store to plaintiff corporation for general sales-room purposes, and for the exhibition and sale of musical instruments and the wares and merchandise of a general music business. Plaintiff, at considerable expense, fitted the rented space to meet the requirements of a music store and established such business. The space rented was not separated by partition from that retained by the lessors as a furniture store. In the spring of 1926, defendants Asiuliewicz discontinued their furniture business, vacated such space, and, in June, 1926, leased the space in the store formerly occupied by them to defendants Simon and Krasmann, to be used for a meat market and grocery store. This resulted in a meat market, grocery, and music store all in one room. Plaintiff filed the bill herein to enjoin such use of the former furniture space and obtained a decree to that effect.

In the brief for defendants it is said:

> "It is the plaintiff's claim that the grocery and meat market business has greatly shocked its artistic and esthetic sensibilities. The plaintiff is profoundly affected by the profane and sacrilegious existence of a humble meat market near the hallowed shrine of music—it jars upon its sense of the fitness of things.
>
> "The defendants deeply regret the necessity of wounding such sensitive and finely attuned natures as characterize the plaintiff, but feel that they cannot, in justice to themselves, forego their rights in this matter."

If the grocery and meat market remain plaintiff may as well move out. Plaintiff's enjoyment of the premises has been materially lessened, but defendants seem to think that, because there is no nuisance, they have not interfered with plaintiff's beneficial enjoyment. Premises are rented for beneficial enjoyment thereof, and in this instance, the enjoyment consisted in having a suitable place to carry on a music store. No one would combine, as a business proposition, a meat market, grocery, and music store. One would not think of going to a butcher's shop to obtain a musical instrument, except under the fallacy of making a whistle of a pig's tail.

Plaintiff deals in musical instruments, inclusive of Victrolas and rec-

ords, and it is well known that purchasers desire a demonstration. A selection from Chopin on a Victrola, played to the accompaniment of a cleaver cracking bones on a butcher's block, might not detract from the sale of the meat but would seriously interfere with the music business. No music dealer, with sense, would expect to be able to carry on his business in a butcher's shop. The carcass of a hog, hung by the heels with opened body and bloody snout may not look out of place in a butcher's shop, but wholly out of place and repulsive in the same room with a music store.

DOG JUSTICE

Contributed by A. L. Hamilton, Morehead City, N. C.

North Carolina, Jones County, in the Superior Court—April Term, 1939.

STATE vs. V. C. GRIFFIN

Judgment

THE defendant having pleaded guilty to the charge of maintaining a public nuisance,—to-wit, a dog of vicious habits and propensities, permitted to run at large and unrestrained; and the court having heard and considered the evidence in the case, and being moved by a compassionate feeling toward the dog inasmuch as the dog himself has been and is unable to make known to the court the mitigating circumstances of the assault charged against him; but the court being persuaded, by the tendered and accepted plea, that the dog's freedom of locomotion should be limited and restricted in the interest of the public welfare, and that the dog's master, the defendant in this action, should be held accountable for the future trespasses of his charge and indemnify one of the prosecuting witnesses, Harvey Foy, for the expenses incurred by reason of the assault made upon him by the said dog, it is thereupon

ORDERED, that the defendant forthwith cause the dog, the subject of dispute in this action, to be permanently impounded or otherwise prohibited from running at large or on premises other than those of the owner (the defendant herein); that the dog himself be and he hereby is condemned as a public nuisance, but he shall not be executed as a public enemy so long as in the care and custody of his master he remain upon his master's premises, unmolesting those who seek to do him no injury, and so long as he refrain from public appearances, nursing and nurturing his present vicious propensities toward and against either bipeds or quadrupeds of the animal kingdom. But should this injunction be violated (and it is devoutly wished that he keep the faith), then, as a public enemy and as such outlawed by this decree, against him the hand of any prejudiced or aggrieved person, or the horns or hoofs of any beast of the field, may with impunity and immunity be laid heavily, that he die the death of the condemned. As long as he remains obedient to this injunction he shall be permitted to hunt and roam the fields and woods with his master, occupy and enjoy his master's premises, and have and receive the kindly ministrations and tender solicitude of all lovers of the canine family, and withal come down to his last days in peace and honor.

The defendant keeper this day shall pay the costs of this action or, in default thereof, shall be committed to the common jail of Jones County for sixty days; and he shall also pay to Harvey Foy, one of the prosecuting witnesses, the sum of $2.00 as reimbursement for expenses incurred for medical treatment.

LUTHER HAMILTON,
Judge Presiding.

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Bancroft-Whitney Co. SAN FRANCISCO, CALIF.

Lawyers Co-op. Publishing Co. ROCHESTER, N. Y.

PSEUDO LEGAL RECORD

Contributor: Judge E. G. Hammock, Second Chancery District, Dermott, Ark.

IN THE COURT OF COMMON TREES

Wood Pecker, *Plaintiff*,
vs.
E. Sparrow, *Defendant*.

John Doe, for Plaintiff,
C. Red Ulity, of Counsel.
Richard Roe, for Defendant.
Rid I. Cule, of Counsel.
Before A. Wise Bird, Judge.

Brief for Plaintiff

A woodpecker pecks a million of pecks
Of sawdust when building his hut;
He works like a nigger to make the hole bigger
And is vexed when his tool doesn't cut.

He's not worried with plans of cheap artisans,
And of him it may truly be said;
That his excavation has this explanation—
He did it all with his head.

Brief for Defendant

And when he has pecked a million of pecks
Of sawdust in building his hut,
A wise English sparrow went straight as an arrow
And ousted the poor red-headed mutt.

The sparrow don't peck—he don't have to, by heck!
He has red-heads to do that for him;
He takes over the house for self and his spouse
And the peckerwood roosts on a limb.

Of the poor old red-head, it may truly be said
That his bean is solid clear through;
He doesn't complain over absence of brain—
The sawdust he manufactures will do.

A hard-headed man will work without plan,
And may peck his way through, with good luck;
But it's an awful good plan for bird or for man
To mix up some brains with his pluck.

For, what is the use to work like the deuce
To peck out some hard proposition,
Then have some gink who knows how to think
Pre-empt it as his own acquisition.

And prove it too! That's just what he'd do;
It would make you so mad you're near dead!
But, remember this, sonny, in grabbing your money
He used the *inside*, not the *outside* of his head.

THE LAWYERS' WAYS

Contributed by Alma R. Miller.

I've been list'nin' to them lawyers
In the court house up the street,
An' I've come to the conclusion
That I'm most completely beat.
Fust one feller rize to argy,
An' he boldly waded in
As he dressed the tremblin' pris'ner
In a coat o' deep-dyed sin.

Why, he painted him all over
In a hue o' blackest crime,
An' he smeared his reputation
With the thickest kind o' grime,
Tell I found myself a-wond'rin',
In a misty way and dim
How the Lord had come to fashion
Sich an awful man as him.

Then the other lawyer started,
An' with brimmin', tearful eyes,
Said his client was a martyr
That was brought to sacrifice.
An' he give to that same pris'ner
Every blessed human grace,
Tell I saw the light o' virtue
Fairly shinin' from his face.

Then I own 'at I was puzzled
How sich things could rightly be;
An' this aggervatin' question
Seem to keep a-puzzlin' me,
So, will someone please inform me,
An' this mystery unroll—
How an angel an' a devil
Can persess the self-same soul?

By Paul Laurence Dunbar.

ANCIENT MARINER

B. was one of the kindest-hearted old fellows at our bar. He could repeat Paradise Lost, or a play of Shakespeare from memory; but he had no head for business. He had a neighbor, a sheriff, with whom he was in constant litigation, who never had a process that he did not use it to annoy him. Once he attached a herd of cows, and actually starved them, so that some of them died and others sold for less than half their value.

B. sued G. for negligence. There was really no defense to the action; but as B. testified to the condition of the cows, G. determined to impeach him.

It was a mean thing to do. He was an old man of seventy years. True, he would promise anything and never keep his promise,—he was loose in his business habits,—but he was as truthful as the average of his brethren. But four of them, who had all had controversies with him, testified that he did not stand upon a par with his neighbors as to truth and veracity. That was our Vermont form of impeaching a witness.

B. made the closing argument. Before a good jury, in the crowded courthouse, he began. His description of the cow—her usefulness, her helplessness, the stony-hearted cruelty of the brute who would starve her—was graphic. But when he came to the impeaching witnesses, he trod the mountain heights of humorous eloquence. "This wretch," he said, "starved my herd of cows. That is scarcely denied; and the defence is that four men, whom some people call lawyers, say that I don't always tell the truth.

"No, I have no ill will against these four. They don't like me,—they don't like anybody, and anybody don't like them. They are not to blame; it's their nature; they can't get rid of their bad smell; they would if they could. Why, I suppose any little black and white animal would smell sweeter if he could. Look at the poor creeturs! There is M. In some things he is great. He can lie in more languages than any man at this bar. He can lie in Greek and Hebrew, in Chinese and Choctaw, and in all kinds of Dutch, and his lie is always made from hardwood ashes. Had he ever a friend that he did not bankrupt? Is there a man in court that likes him? If there is, let him raise a hand for me, maybe I will go to impeaching my brothers of the bar. I will lie right down in sackcloth, as old Ahab did when Elijah caught him trying to steal Naboth's grapevines.

"Then there is R. He has been slandered in this community. Everybody says that he has no heart,—that he is a kicker, like Ishmael. I know he has a heart; it's just about the size of a beech-nut, and just as sharp-cornered!

"M. is only three feet and four inches high, and by common consent the meanest man in this community. What a mercy he didn't grow bigger! When M. was born, his father said he wasn't worth raising; but his mother said he could be raised on skim milk from a bottle, and would make an errand-boy. Somebody tried to change the order of Providence and make a lawyer of him. He spoiled an errand-boy and didn't make a lawyer.

"The last and least of the four impeachers is A. Now, I am not so hard-hearted as to say a word against him. I pity him. He's a poor debilitated old man, in his second childhood, and he always has been ever since he was a small boy! On the other side is B., an old fellow full of faults; but he never wilfully injured a man or woman, impeached a brother lawyer, or starved a cow. Here is his case, and here are the mangled remains of the impeachers. Gentlemen, judge between us!"

YOUNG LAWYER'S REFLECTIONS ON HIS FEE BOOK

Contributed by George F. Edwardes, Texarkana, U. S. A.

As the ink dries on the above small entry, made on my 28th birthday, I have decided to pause a moment and reflect on the things less tangible but more important than the entry of retainers in this to me historic fee book. The now nearing seven years of my practice has been an exquisite joy. Its early pangs of hunger and long miles of white uninked parchment in this book are not so much a tribute to my perseverance as the best evidence my peculiar selection of a means to live or die, but dying living still in the grandeur of the noblest of the liberal professions. Most of the fees in this mute legend are intelligible only to myself. As I turn its pages I behold monuments that while at that moment they meant life and success they have become symbolical of deeds. They are clean fees not exacted unjustly from the bone and marrow of the suffering and the destitute, but fees that were gladly paid for a service that was zealously given. The first fee of all was the then stupendous sum of $5.00 for an opinion. In reflection I rather believe the client was more anxious that I have the $5.00 than that he have the advice. At any event it is a consolation to examine my files and find that I still adhere to the same opinion that I then rendered and this opinion is now fortified by a long array of precedents, and I see neither ground nor expediency to reverse, distinguish, or modify that early opinion. Passing on I find a $25.00 entry for drafting a contract for a group of independent merchants to purchase collectively through an association increasing their power to buy at reduced prices; the idea was both good and workable. I find a $50.00 entry for impressing a trust upon a fund that a crooked scoundrel obtained through the illegal sale of a widow's property. I was reluctant to assess a fee at all, but I had heard that the unfeed is soon an unfed lawyer, and that one of such calibre is not worth the fee. I find an entry of $37.50 for a divorce fee, and on the next page a deduction of $37.50 which was refunded to the client. He had attempted to perpetrate a fraud on the court and his counsel, and I preferred to refund his fee than embarrass my conscience in the great privacy of my soul. On further I find $10.00 credited to my life and success for preventing a foreign corporation which had illegally done business in this state from repossessing some furniture from a widow who had several children. On page 31 I find an entry of $50.00 for representing the respondent (the grandfather) in a habeas corpus suit filed by a mother for the custody of her child. The trial progressed to a hysterically tearful stage, and the horrible spectacle of a mother being denied her child, even though she had neglected it, made it impossible to let the suit continue further. A happy adjustment was gained at the most emotional moment and the grandfather gained a daughter as well as retained his grandchild. Then a month's total looms before me, it is $675.00 for a month's work and it was a tedious, if profitable month, and each client who paid me would pay me again for the same services in the same manner. Yes, my conscience is clear. The vast majority of my cases have been won; my ambition has become even more enthusiastic, if a little more civilized. Each case has lived in my office and in my heart. Those that did not make suitable tenants for my heart I rejected and rejoiced at the power to do so. Only the very poor hire young lawyers and they are usually in the right. To that fact I attribute my modest degree of success.

The insecure positions of the poor is a temptation to the unjust to impose upon them and seek to deprive them of their rights of property and liberty. In recent years the laity has hurled bitter invective at the bar and its members, but the courts and their legal disciples daily enforce the jural contract that binds us peacefully together into one great community. I love the law, its broad philosophy, and its neat orderliness. It is an invisible pyramid upon which could be and is builded the lighthouse that guides humanity safely past the shoals and reeves of anarchy and its consequent chaos.

GOAT CONTRACT

Contributor: Albert L. Moses, Alamosa, Colorado.

THE following is an exact copy of a contract which was submitted to our contributor, who writes: "We have often heard of 'getting a fellow's goat' but this is the first time, so far as we are advised, of anyone ever buying a goat and giving it to his debtor in order that his debtor might from the increase of the goat pay the amount which he owed him.

"If that contract isn't sui generis, I would like to have some of my brethren of the Bar point out something similar, or even in the same class. In fact I would go so far as to say one based upon the same principle.

"In this contract the creditor did not see fit to forgive the debtor the debt which he owed him, but he did give the debtor the means with which to pay the debt, and I am told that the debt is in very good form today and the security for the payment becoming more adequate day by day."

The contract in full is as follows:

Alamosa, Colorado,
April 1st, 1935.

Mr. Richard Roe.
Dear Sir:

In order to assist you in an effort to pay your account to me, which at this time is in excess of $700.00, I make you the following proposition:

I will deliver to you one nanny goat. You are to dispose of all male goats raised by this nanny goat, or its increase, and turn the proceeds into female goats. You are to continue with the herd over a period of six years from this date, and to receive all proceeds therefrom except proceeds from the sale of the male goats. At the end of six years, it is anticipated that your herd will have increased sufficiently to permit payment of my account, which I agree to settle at the end of six years for $700.00. You have the privilege of either paying me the $700.00 in cash or returning to me the entire herd of goats then being handled by you. It is understood and agreed that the nanny goat I deliver, as well as all of her increase and increase from her increase are to be my property. At the end of six years from this date, you are to make an accounting to me either by payment of $700.00 in cash or the delivery to me of the entire herd of goats then under your management. I am also to hold your one half interest in hay and pasture on my place as additional protection for feed of goats. If accepted, this offer to be binding on your heirs, administrators and assigns.

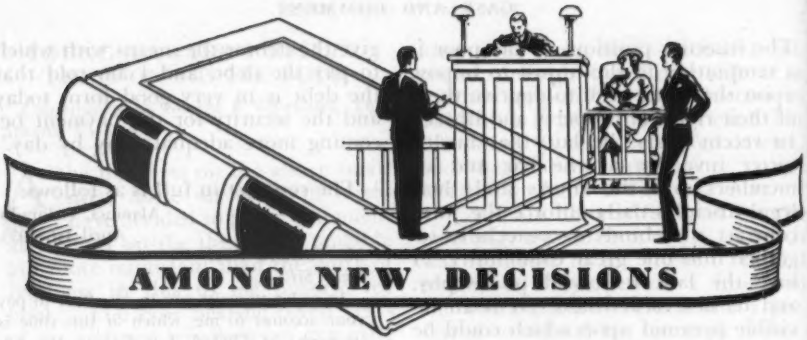
John Doe.

Your offer is accepted, and I acknowledge delivery of the nanny goat described.

Richard Roe.

Witness: John Brown.

¶ AN *aged lawyer who looked back over his career said: "When I was young, I lost many cases I ought to have won. When I was old, I won many cases I ought to have lost. And so, on the whole, Justice was done."—Bench and Bar, Canada.*



Advertising — *sound truck in street.* In Brachey v. Maupin, — Ky. —, 126 S. W. (2d) 881, 121 A.L.R. 969, it was held that no accidents have resulted during the many years a sound advertising truck has been in operation on the streets does not militate against the validity of an ordinance prohibiting operation of such trucks altogether in certain localities and during certain hours in other localities.

Annotation: Public regulation of sound trucks or other forms of advertising by vehicles in streets or highway. 121 A.L.R. 977.

Attorneys' Fees — *incompetent's estate.* In Kay v. Kay, — Ariz. —, 89 P. (2d) 496, 121 A.L.R. 1496, it was held that attorneys' fees and expenses incurred in good faith to restore to capacity one previously adjudged incompetent, when reasonably necessary, may be charged against the ward's estate whether the proceedings are successful or not.

Annotation: Attorneys' fees or other expenses incident to proceeding for judicial determination of restoration of sanity or capacity of one previously adjudged to be insane or incompetent as a charge against his estate. 121 A.L.R. 1501.

Banks— *recovery of amount paid on forged check.* In Cairo Banking Co. v. West, — Ga. —, 2 S. E. (2d) 91, 121 A.L.R. 1048, it was held that where forged checks as referred to in [headnote 2] are cashed by a third person to whom they are indorsed, and they pass from one indorsee to another by a series of indorsements, and the last indorsee presents the checks to the drawee bank to whom they are paid without detecting the forgery, the rights of the drawee bank as against the indorsers differ from its liability to the depositor. In such case if the drawee bank is without fault other than mere failure to recognize the discrepancy, where the signature is not a plain and palpable forgery, it may recover from the several indorsers, not alone upon their statutory liability as such, but for negligence in accepting the checks under suspicious circumstances without inquiry as to genuineness and indorsing them in a manner tending to mislead the drawee bank and cause it to pay them without detecting the forgery, thus contributing to the successful result of the forgery.

(a) The allegations "that your petitioner was without any fault of any kind whatsoever," considered with the context, was sufficient upon general demurrer as to plaintiff being without fault.

(b) The allegations "that each defendant [indorser] herein, except B. W. West [the depositor] was guilty of gross negligence in cashing said checks as shown in exhibit B hereof in each instance and that said de-

fendants in each particular instance failed to exercise the slightest diligence in ascertaining whether or not such check, so cashed, was genuine, and were negligent in failing to require proper and sufficient identification of the payee of such check in each instance," were sufficient upon general demurrer as to negligence of the several indorsers.

(c) The petition alleged a cause of action against the several indorsers sufficiently as against a general demurrer.

Annotation: Right of drawee of forged check or draft to recover amount paid thereon. 121 A.L.R. 1056.

Bills and Notes — *renunciation of rights by holder.* In Northern Drug Co. v. Abbett, — Minn. —, 284 N. W. 881, 121 A.L.R. 1349, it was held that renunciation by the holder of a negotiable instrument of his rights under the instrument discharges the parties under Mason's Minn. Stat. 1927, § 7165. Such a discharge is by act of the party.

Annotation: Scope and effect of provision of Negotiable Instruments Law as to renunciation of rights. 121 A.L.R. 1353.

Champerty — *agreement to defend against claims.* In Fordson Coal Co. v. Garrard, — Ky. —, 125 S. W. (2d) 977, 121 A.L.R. 841, it was held that an agreement by a grantee as part consideration for a conveyance of an interest in land and timber rights to defend any litigation which third persons might bring to defeat his title or that of a joint owner of part of the property is not void as champertous or maintenous, since the grantees did not intend to stir up trouble and their compensation was not dependent in any way upon the success of prospective suits, their undertaking being merely that in case of such suits they would defend not only the title of their co-owner but their own as well.

Annotation: Contract by one person to defend litigation that has been or may be instituted against another as champertous or maintenous. 121 A.L.R. 847.

Constitutional Law — *succession taxes.* In Texas v. Florida, — U. S. —, 83 L. ed. (Adv. 549), 59 S. Ct. 563, 121 A.L.R. 1179, it was held that two or more states may each constitutionally assess death taxes on a decedent's intangibles upon a judicial determination that the decedent was domiciled within the state, in proceedings binding upon the representatives of the estate but to which the other states are not parties.

Annotation: Diverse adjudications of domicil as regards taxation, administration or distribution of estates. 121 A.L.R. 1200.

Contracts — *attorney's consent.* In Butler v. Young, — W. Va. —, 2 S. E. (2d) 250, 121 A.L.R. 1119, it was held that a stipulation in a contract between an attorney and client for contingent fees prohibiting the latter from making a compromise without the former's consent is void as against public policy. Nevertheless, its inclusion in a contract otherwise valid will not destroy the legal effect of the remaining provisions.

Annotation: Validity of stipulation, in contract between attorney and client, prohibiting or restricting right of latter to compromise without former's consent, and effect of invalid stipulation in that regard upon rest of contract. 121 A.L.R. 1122.

Criminal Law — *evidence of motive.* In State v. Perelli, 125 Conn. 321, 5 A. (2d) 705, 121 A.L.R. 1357, it was held that evidence offered by defendants in a murder trial of a motive to commit the crime on the part of a third party is not admissible, at least until there has been some evi-

dence which directly connects that third party with the crime.

Annotation: Admissibility in criminal prosecution of evidence of motive of one other than defendant to commit the crime. 121 A.L.R. 1362.

Elections — *time of holding.* In Rainwater v. State, — Ala. —, 187 So. 484, 121 A.L.R. 981, it was held that a statutory provision as to the time for holding an election will be treated as directory where it appears from the general scope and policy that such is the legislative intent.

Annotation: Validity of public election as affected by fact that it was held at time other than that fixed by law. 121 A.L.R. 987.

Evidence — *presumption of ownership.* In Hill v. Cabral, — R. I. —, 2 A. (2d) 482, 121 A.L.R. 1072, it was held that a statute providing that in an action to recover for injuries arising out of an accident or collision of a motor vehicle operated upon a public highway, evidence that at the time of the accident or collision it was registered in the name of the defendant as owner shall be prima facie evidence that it was then being operated by and under the control of a person for whose conduct the defendant was wholly responsible, and that the absence of such responsibility shall be an affirmative defense to be set up in the answer and proved by the defendant, has the effect of making proof of registration in the defendant's name prima facie evidence of his responsibility, which evidence remains in the case, for the consideration of the jury, even after the introduction of evidence to the contrary, and prevents the direction of a verdict for the defendant, and does not create a mere presumption which would have no probative force and which would disappear upon the introduction of any rebutting evidence.

Annotation: Distinction between effect of fact to create presumption of further fact and its effect as prima facie evidence of the further fact in determining burden of proof and weight of evidence. 121 A.L.R. 1078.

Executors — *discontinuing bond.* In Re Dillard, 184 Okla. 534, 88 P. (2d) 639, 121 A.L.R. 947, it was held that where the will of a testator specifically waives the giving of a bond by the executor therein named, the requirement of a bond is within the sound discretion of the county court, under § 1164, Okla. Stat. 1931, 58 Okla. Stat. Anno. § 178, and after the court has required such a bond his discretion in the matter continues so that he may later discontinue the requirement upon the application of the executor if the circumstances warrant such action.

Annotation: Power or discretion of court, after bond of executor, administrator, or testamentary trustee has been given, to dispense with, discontinue, or modify bond. 121 A.L.R. 951.

Executors — *Premature payment.* In Russell v. Davison, 184 Okla. 606, 89 P. (2d) 352, 121 A.L.R. 1063, it was held that where a bequest is delivered to, received, accepted, used, and claimed by a legatee prior to the probate of a will and the issuance of letters testamentary, such facts may be properly shown in an action thereafter brought by such legatee against the executor and his bondsman to recover damages for a failure to deliver the legacy after the entry of the decree of distribution.

Annotation: Payment or delivery of legacy or distributive share before decree of distribution as defense to action by legatee or distributee against personal representative or surety on his bond. 121 A.L.R. 1069.

Executors — *tombstone or monument.* In Re Earnest, 149 Kan. 636, 88 P. (2d) 1048, 121 A.L.R. 1098, it

was held that a tombstone or monument to be erected at the grave of a deceased person is not a necessary item of funeral expense.

Annotation: Tombstone or monument as a proper charge against estate of decedent. 121 A.L.R. 1103.

Fraudulent Conveyances — *conveyance of estate by entireties.* In C. I. T. Corp. v. Flint, — Pa. —, 5 A. (2d) 126, 121 A.L.R. 1022, it was held that a conveyance in trust by husband and wife of an estate by entireties is not subject to attack as a fraud on creditors, by a judgment creditor of the husband, notwithstanding that if the husband had owned the property either individually or as a tenant in common, the conveyance would have been in fraud of creditors.

Annotation: Right of creditors of one spouse, either before or after death of other spouse, to attack conveyance or encumbrance of estate by entireties by both spouses as in fraud of creditors. 121 A.L.R. 1028.

Guardian and Ward — *lease extending beyond minority.* In Coxe v. Charles Stores Co. — N. C. —, 1 S. E. (2d) 848, 121 A.L.R. 959, it was held that in the absence of statutory authority a guardian of an infant cannot overreach his time so as to bind the ward by a lease extending beyond the ward's minority.

Annotation: Power to lease or to authorize lease of infant's land beyond minority or guardianship. 121 A.L.R. 962.

Husband and Wife — *limitation of actions between.* In Cary v. Cary, 159 Or. 578, 80 P. (2d) 886, 121 A.L.R. 1371, it was held that the doctrine that the statute of limitations or laches does not apply where a transaction between a husband and wife is involved is not changed by a statute which suspends the running of the statute of limitations in actions by married women for a certain period during "such disability."

Annotation: Applicability of statute of limitations or doctrine of laches as between husband and wife. 121 A.L.R. 1382.

Income Taxes — *deduction of penalties.* In State Tax Commission v. Phelps Dodge Corp. — Ariz. —, 88 P. (2d) 79, 121 A.L.R. 1458, it was held that amount paid by a corporation, as interest or penalty on delinquent portion of property taxes, following an adverse decision of a Federal court in a suit instituted by the corporation in good faith to enjoin collection of taxes in excess of those due upon 60 per cent of the true cash value, it having previously concluded, after investigation, that substantially all other property in the state was assessed upon that proportion of its value, and having tendered and paid the tax on that basis, and unsuccessfully applied to equalizing authorities of the state for relief, is deductible in computing its income tax for the year in which the delinquencies occurred as "ordinary and necessary expenses" in the maintenance and operation of its business within the provision of the state income tax statute in that regard.

Annotation: Income tax: deductibility of interest or penalties paid or incurred by taxpayer on account of delinquent or deferred taxes. 121 A.L.R. 1464.

Income Taxes — *interest on "obligations" of state.* In Commissioner of Internal Revenue v. Carey-Reed Co. 101 F. (2d) 602, 121 A.L.R. 1272, it was held that interest on street improvement and sewer bonds signed by the mayor and treasurer of a city, which carry an obligation upon the part of the city issuing them to collect special assessments and pay them to the holders of the bonds, is exempt from Federal income tax under provisions of the revenue acts exempting

interest on "obligations" of a state or any political division thereof, notwithstanding that the promise on the part of the city, as authorized by statute, is to pay principal and interest exclusively out of funds actually paid to and collected by the city on account of special taxes, and notwithstanding state court decisions holding that special assessments do not involve taxation in the sense of the constitutional provision limiting tax rates, or indebtedness in the sense of the constitutional provision placing a limit upon municipal indebtedness.

Annotation: Scope of term "obligations" in provision of Internal Revenue Act exempting interest upon obligations of state, territory, or political subdivisions from tax. 121 A.L.R. 1276.

Incompetent Persons — *restoration to sanity.* In Bradford v. Ragsdale, — Tenn. —, 126 S. W. (2d) 327, 121 A.L.R. 1506, it was held that the chancery court has no inherent jurisdiction of the person or estate of a lunatic, specifically no such jurisdiction respecting restoration to sanity and competency.

Annotation: Jurisdiction of proceedings for restoration to competency of one who has allegedly regained sanity after an adjudication of incompetency. 121 A.L.R. 1509.

Indictment, etc. — *error in naming offense.* In State v. Schnell, — Mont. —, 88 P. (2d) 19, 121 A.L.R. 1082, it was held that when the facts, acts, and circumstances are set forth with sufficient certainty to constitute an offense, it is not a fatal defect that the complaint gives the offense an erroneous name.

Annotation: Error in naming the offense covered by allegations of specific facts in complaint, indictment, or information. 121 A.L.R. 1088.

Infants — *waiver of process.* In Herr v. Humphrey, — Ky. —, 126 S. W. (2d) 809, 121 A.L.R. 954, it was held that an infant can neither acknowledge nor waive regular service of process upon him as required by statute.

Annotation: Power of infant to acknowledge service of process or to bind himself by waiver or estoppel in that regard. 121 A.L.R. 957.

Insurance — *effect of incontestable clause.* In New York Life Insurance Co. v. Bonasso, — W. Va. —, 2 S. E. (2d) 260, 121 A.L.R. 1433, it was held that a policy of insurance covering the life of the insured, and also providing for disability and double indemnity benefits, and which contains a clause making the policy incontestable after two years from its date of issue "except as to provisions and conditions relating to disability and double indemnity benefits," does not preclude a suit by the insurer to cancel the disability and double indemnity provisions, on grounds of alleged fraud in the procurement of the policy, instituted more than two years after the date of issue of the policy.

Annotation: Incontestable clause of statute or policy as applicable to claims other than for death benefits. 121 A.L.R. 1437.

Insurance — *ratification of policy.* In Continental Insurance Co. v. Riggs, — Ky. —, 126 S. W. (2d) 853, 121 A.L.R. 1421, it was held that after a loss by fire the owner of the property may ratify the act of another who had procured a fire insurance policy for him and in his name, but without his knowledge or authority, but if he does so he adopts the whole policy.

Annotation: Ratification of insurance taken out by one person without knowledge, consent, or authority of another as affecting rights of latter, under policy issued to him with provision against other insurance. 121 A.L.R. 1428.

Judgment — *res judicata.* In Wright v. Schick, 134 Ohio St. 193, 16 N. E. (2d) 321, 121 A.L.R. 882, it was held that if, in an action against defendant, against whom judgment for personal injuries has been recovered, and his insurer, the defendant and the insurer were in reality adversaries on the controlling issue as to whether the insurance policy was in force at the time of the plaintiff's injuries, and such issue is in fact litigated and finally determined, it is res judicata as between defendant and the insurer in any subsequent action wherein the defendant and the insurer are aligned as adverse parties on such issue.

Annotation: Judgment against tortfeasor's insurer in action by injured person as res judicata in similar action by another person injured in same accident. 121 A.L.R. 890.

Libel and Slander — *charging association with negroes.* In Sharp v. Bussey, — Fla. —, 187 So. 779, 121 A.L.R. 1148, it was held that statement that a respectable white man resident in Florida and mayor of a Florida city was at a negro dance hall dancing with negro wenches, is actionable if false and not privileged, since its natural and proximate consequence is to cause injury to plaintiff in his social, official, and business relations of life.

Annotation: Libel and slander: imputation of association with persons of race or nationality as to which there is social prejudice. 121 A.L.R. 1151.

Life Tenant — *right to proceeds of lease.* In Lang v. Mississippi Valley Trust Co. — Mo. —, 124 S. W. (2d) 1198, 121 A.L.R. 891, it was held that life beneficiary, who at the time of the decree was over fifty-nine years of age, under a trust which held title to an undivided one-half interest in the premises, was entitled as income to the whole of one half of the amount paid by lessee for cancelation of a lease executed by the trustee and the cotenants with an unexpired term of forty-four years.

Annotation: Rights of life tenant (legal or equitable) and remaindermen in respect of amount paid by lessee in consideration of release. 121 A.L.R. 900.

Limitations — *duress tolling.* In Chatfield v. Seattle, — Wash. —, 88 P. (2d) 582, 121 A.L.R. 1279, it was held that duress on the part of city officers sufficient to toll the statute of limitation against action by employees, who were protected in their position by civil service provisions of the city charter, to recover amount illegally deducted from their compensation, held on appeal from a judgment in favor of the employees not sufficiently supported by the evidence.

Annotation: Duress or undue influence as tolling or suspending statute of limitations. 121 A.L.R. 1294.

Mortgage — *judgment on note as affecting mortgage.* In Beckett v. Clark, — Iowa, —, 282 N. W. 724, 121 A.L.R. 912, it was held that the holder of a note secured by mortgage may sue directly on the note in a law action and recover judgment and thereafter maintain a separate action for the foreclosure of the mortgage.

Annotation: Judgment for debt without foreclosure of mortgage securing it as affecting mortgage, or right to foreclose the same, where no execution or attachment is levied under the judgment. 121 A.L.R. 917.

Optometry — *practice of.* In State v. Ritholz, — Iowa, —, 283 N. W. 268, 121 A.L.R. 1450, it was held that opticians who fill prescriptions of licensed optometrists are not engaged in practice of optometry within statute which declares that persons shall be deemed so engaged who employ any means other than drugs for measurement of the eyes and adapt lenses for

aiding the same; persons who allow the public to use any mechanical device for such purposes; persons who publicly profess to be optometrists and to assume duties incident to such profession—by reason of reciprocal arrangement with licensed physicians who are furnished rooms near those in which the optical business is carried on, bills for rent, light, heat, and telephone being paid by the opticians, who also furnish the equipment used by the optometrists, the latter being entitled to retain the fees for their examinations and being guaranteed weekly minimum earnings, it being a part of the arrangement that they should direct their patients to the opticians to have the prescriptions filled, it appearing from the evidence that the latter do not coerce or influence the physicians relative to the prescriptions.

Annotation: One who fills prescriptions under reciprocal arrangement with physician or optometrist as subject to charge of practice of medicine or optometry without license. 121 A.L.R. 1455.

Partnership — *bond of surviving partner.* In Campbell, Glenn & Campbell v. Bohan, 148 Kan. 205, 80 P. (2d) 1110, 121 A.L.R. 856, it was held that the surviving partner has the primary right to manage and close the partnership affairs but in order to qualify for such administration he is required to make a bond as required by Gen. Stat. 1935, §§ 22–402, 22–403.

Annotation: Construction and application of statute requiring surviving partner to give bond as condition of his right to manage and settle partnership affairs. 121 A.L.R. 860.

Pleading — *amendment of characterization of party.* In Blackwood v. Spartanburg Commandery, 185 S. C. 56, 193 S. E. 195, 121 A.L.R. 1320, it was held that propriety of an amendment of a complaint by changing the characterization of the defendant from a corporation as originally alleged to an unincorporated association should be determined without regard to the ultimate effect that the allowance of the amendment may have upon the liability, as members of the association, of individual defendants, who were also sued as indorsers.

Annotation: Amendment of process or pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa. 121 A.L.R. 1325.

Powers — *partial invalidity of attempt to exercise.* In Old Colony Trust Co. v. Richardson, — Mass. —, 7 N. E. (2d) 432, 121 A.L.R. 1218, it was held that where an exercise of a power to appoint property is in part valid and in part invalid, such exercise, so far as valid, will be given effect if the valid and invalid elements are separable.

Annotation: Effect of partial invalidity of attempted exercise of power of appointment. 121 A.L.R. 1226.

Public Moneys — *appropriation for widows of judges.* In People v. Barrett, 370 Ill. 478, 19 N. E. (2d) 356, 121 A.L.R. 1311, it was held that appropriation by the legislature to the widows of deceased circuit judges in amounts equal to salary from the date of death to the time of qualification of successors, or to a substantial portion of such salary, are not unconstitutional as made for a private rather than a public purpose, though there was no declaration of a public purpose in the legislation.

Annotation: Constitutionality of appropriation of public funds for benefit of widow or other relative of deceased public officer or employee. 121 A.L.R. 1317.

Real Property — *specific performance.* In White Tower Management

Corp. v. Taglino et al. — Mass. —, 19 N. E. (2d) 700, 121 A.L.R. 1158, it was held that specific performance of a contract for the purchase of real property denied, it appearing that if defendants (vendors) had known that the plaintiff, a restaurant company, was in fact the prospective purchaser, they would not have entered into the agreement, and that they so stated to the complainant's agent, who concealed or misrepresented the fact as to the real purchaser.

Annotation: Concealment of fact that one of parties to land contract was acting for third person, or misrepresentation as to identity of party for whom he was acting as reason for denying specific performance, or for rescission of contract. 121 A.L.R. 1162.

Record — *of invalid deed.* In Johns v. Scobie, — Cal. (2d) —, 86 P. (2d 820, 121 A.L.R. 1404, it was held that where a tenant in common enters into possession and claims under an invalid deed purporting to convey the property to him, the recordation of the deed is notice to his cotenants of its existence and therefore of the adverse character of his claim so as to start the statute of limitations running, at least where he knew nothing of the existence of the other cotenants.

Annotation: Record of deed to cotenant as notice to other cotenants of adverse character of grantee's possession. 121 A.L.R. 1411.

Religious Societies — *power to accept gift for orphanage.* In Curtis v. Maryland Baptist Union Association, — Md. —, 5 A. (2d) 836, 121 A.L.R. 1516, it was held that a religious corporation whose powers as defined by its charter are the advancement of true religion, supplying destitute neighborhoods with preaching, encouraging diffusion and reading of the sacred Scriptures and evangelical books and tracts, providing fraternal intercourse among Baptist churches, and affording opportunity of preaching and other devotional exercises, has no power to accept a bequest under a will which provides in effect that the fund shall be used for the establishment of an orphans' home, as such purpose is beyond the powers defined by its charter.

Annotation: Implied power of corporation belonging to one of the three classes, religious, charitable, or educational, to promote, or to accept gifts for, objects which more appropriately pertain to the purposes of those in one of the other classes. 121 A.L.R. 1526.

Schools — *denial of scholarship to pupil receiving highest rating.* In Hobbs v. Hodges, — Md. —, 5 A. (2d) 842, 121 A.L.R. 1468, it was held that board of education has no discretion to deny scholarship to qualified pupil who received highest rating on competitive examination, and award it to one who received lower rating, under a statute which provides that all selections for the scholarship shall be made by competitive examination from among class who reside in the legislative district for which they are respectively chosen and who are or have been students in the public schools of such districts, and the students so selected shall be entitled to the scholarships.

Annotation: Discretion of school authorities to deny to pupils or teachers scholarship, certificate, diploma, license or other like privilege, to which they would be otherwise entitled by law. 121 A.L.R. 1471.

Seduction — *action by woman seduced.* In Kirkpatrick v. Parker, — Fla. —, 187 So. 620, 121 A.L.R. 1481, it was held that peculiar circumstances which will enable an adult woman to maintain an action for her own seduction may consist of force,

duress, or overpowering control or influence successfully used to seduce.

Annotation: Right of seduced female to maintain action for seduction. 121 A.L.R. 1487.

Warehousemen — *liability on bond.* In Republic Underwriters v. Tillamook Bay Fish Co. — Tex. —, 126 S. W. (2d) 641, 121 A.L.R. 1152, it was held that surety on a public warehouseman's bond conditioned for the faithful discharge of duties of the principal as a public warehouseman, in accordance with statutes which do not make it the duty of a warehouseman to collect and remit sale price of goods stored with him, is not liable for the principal's failure to remit proceeds of a sale collected by him, notwithstanding that extra statutory duties in respect of collection and remittance are customarily assumed by warehousemen.

Annotation: Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise. 121 A.L.R. 1155.

Workmen's Compensation — *exclusive of remedy furnished by act.* In Triff v. National Bronze & Aluminum Foundry Co. 135 Ohio St. 191, 20 N. E. (2d) 232, 121 A.L.R. 1131, it was held that the right of action of an employee for the negligence of his employer directly resulting in a noncompensable occupational disease has not been taken away by § 35, art. 2, of the Constitution of Ohio, or by § 1465–70, Gen. Code. Zajachuck v. Willard Storage Battery Co. 106 Ohio St. 538, 140 N. E. 405, and Mabley & C. Co. v. Lee, 129 Ohio St. 69, 193 N. E. 745, 100 A.L.R. 511, overruled.

Annotation: Workmen's compensation act as exclusive of remedy by action against employer for injury or disease not compensable under act. 121 A.L.R. 1143.

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Md typixt's aw-py on vasction3
a fact gou can eaxily zee—
IT's odd how thees letirs get mizxed up
O brine back my tipr to me.,?
—Ediphone Voice Writing.

Refusing to Compete. The junior member of the firm applied to the senior member for suggestions in a case where a party had placed a fraudulent deed on the real estate belonging to a client, who was a very religious old lady. Junior had advised that she bring suit at once to set aside the deed, and explained the trouble the client would have if this was conveyed to an innocent purchaser.

The old lady was "agin" going to any law, but said that she was a widow woman and that the Lord would protect her in her rights. And inquired Junior, "What in the world can I tell the old lady?" The Senior's direction was to tell her that getting this title straight is practicing law, and that is one thing the Lord absolutely refused to do.

Contributor: J. S. Simmons,
Hutchinson, Kan.

The Unknown. Woman Client: Coming breathlessly into lawyer's office said, "I just got out of jail. They have been holding me over there for the last thirty hours, on you know what? superstition!"

Lawyer (laughing lustily): "You mean suspicion?"

Woman Client: "Yes, well—that just shows all I know about law."

Contributed.

Loyalty. When the lawyer's stenographer says: "Why he just stepped over to the library for a moment," it comes under the head of loyalty."—*Flickers.*

Standard Equipment. A local automobile dealer sold a cow to a party and in securing the balance of the purchase money took a bill of sale (mortgage) from the purchaser of the cow. The automobile dealer used one of the forms suited for retaining title when he sold automobiles.

As a result, the cow note read as follows: "The undersigned purchaser has purchased and acknowledged delivery of the following property complete with standard attachments and equipment: One milk cow, named Dazy, butt headed, color light cream, Jersey."

(Paper recorded in Mortgage Book 91, page 505, Office Clerk Superior Court, Monroe County, Georgia.)

Contributor: Wm. B. Freeman,
Forsyth, Ga.

Zounds! A certain deputy sheriff was told by his superior to go to a certain farm and levy on two thousand pigs. The deputy searched all over the farm for the pigs but could not find more than a couple of old sows with their litters. Returning to the sheriff he said, "There aren't two thousand pigs on that farm." "Two thousand pigs!" replied the sheriff, "I told you two sows and pigs."

Contributor: Lloyd A. Hendricks,
Lincoln, Neb.

Who Was Hung? In the Friday, November 11, 1938 issue of The Saint Jo Tribune, weekly newspaper, published at Saint Jo, Montague County, Texas, under the heading "Courthouse Facts—Criminal Cases" appeared the following:

"The State of Texas vs. Jack Hail. Rape. Pleaded guilty. Hung jury."

Contributor: Luther W. Davis,
Austin, Texas.

When Homer Sang. The young son of a Florida attorney was being questioned by his mother concerning his studies. When asked who Homer was the boy replied that he was a Greek poet. When questioned as to what Homer wrote, he replied, "The Idiot and Oddists."

Contributor: Hayford O. Enwall,
Miami, Fla.

Too Learned. "Several years ago," writes a contributor, "I was counsel for defendant in the Circuit Court of this county in the case of State v. Vestal, wherein defendant was charged with the criminal offense of wife desertion. (Non-support was also charged in the indictment, but the Court held with me in my contention that the charging portion of the indictment did not charge the crime of non-support, and this question was removed from the jury.) The desertion, if desertion existed in fact, had continued uninterruptedly to the time of trial. The date upon which the defendant left the prosecutrix, and the date subsequent to which the parties never lived together or cohabited, was fixed and undisputed. I based my defense upon the proposition that the attendant circumstances did not constitute desertion under the statute.

"I realized my case was weak, and that my client would be fortunate if he could obtain a hung jury. I had little or no hope of obtaining an outright acquittal. After the evidence was all in the Court commenced his instructions to the jury. At the close of the instructions he instructed that 10 of their number might reach a verdict. (Several months or a year before our legislature had enacted a 10–2 verdict in certain criminal cases, of which this was one.) I was on my feet immediately, protesting, contending that if a desertion had occurred in fact, that desertion was a completed crime upon the date it occurred, and that defendant could not be convicted except upon a unanimous verdict. (The date upon which defendant left the prosecutrix was prior to the enactment of the 10–2 statute.) The district attorney vigorously opposed my construction of the law and insisted that desertion was a continuing offense and that the 10–2 law was applicable. After a few words in open court counsel retired to the Judge's chambers, and there the question was thoroughly discussed and considered, the Judge finally holding with me that a unanimous verdict was required, and returned to the bench and so instructed the jury. After several hours the jury reported they were unable to agree, standing 10–2 *for acquittal.*"

Contributor: Robt. E. Lees,
Ontario, Ore.

Classroom Laugh. Professor: In the early days of the common law one drawing up a declaration was called a countour or counter because he drew up a count.

Student: Did that make the lawyer a fixture?

Contributor: A. Cerza,
Chicago, Ill.

Reward for Faithful Service.

A lawyer sat in his office chair
Repeating slowly The Lord's Prayer.
His shoes were patched and his clothes threadbare
While his face looked haggard and worn with care.

He was thinking of the Pearly gate
While trying to settle the Smith estate
And satisfy the Smith heirs (eight)
And each of them burning up with hate.

Saint Peter softly whispered to him
Saying: "Come on up and I will let you in.
Your sorrows since nineteen hundred and eight
Have earned you a pass through the Pearly gate.
Because of your sorrows since nineteen seven
I know you will appreciate the joys of Heaven.

Contributor: C. L. Foster,
Sedgwick, Kans.

Honeymoon Patrol. A young Missouri farmer, living near the State line, was engaged to a girl in an adjoining State, not far from the border. The morning of the wedding he received a telegram from a relative to stop at the freight station in town and pick up a wedding gift. His only car was a pick-up truck and he dutifully called at the depot for the gift, which turned out to be a big electric refrigerator. He loaded the gift on his truck and, not having time to return to his farm, set out for the bride's home. These things happened:

1. As he drove by the port-of-entry just across the State line, he was challenged by the guard.

2. He failed to stop, but a pistol shot at his rear tire brought him up.

3. The official laughed at his story about being on the way to a wedding. It was obvious that here was a salesman trying to deliver merchandise into the State without paying the highway tax. Even use of a phone was refused until the guard finished giving him the third degree.

4. Finally a call to the bride's home convinced the guard and our hero proceeded on his way.

5. The wedding over, he set out for home with his bride beside him. This time he approached the port-of-entry post with caution and, sure enough, was halted.

6. A different guard was on duty, of course, and it took more arguing and another phone call before the honeymoon could continue.

7. All this occurred, the narrator—Gov. Lloyd C. Stark of Missouri—points out, in free America, where the Constitution specifically forbids the States to interfere with commerce between the States. (Governor Stark told the story at the Interstate Trade Barriers Conference in Chicago.)

—Printers' Ink, April 13, 1939.

Oh, Henry! C. D. Bray tells about a lawsuit he started about a month or two ago which has become somewhat remarkable, not only for the several angles it has taken but also for the prominence of the name "HENRY" among the lawyers and officers.

The suit was instituted on a note in a justice of the peace court in the usual way. Judgment was obtained and an execution issued and the proceeds of an insurance policy which was about to be paid to the defendant was levied on. The defendant then employed two lawyers to contest the legality of the levy. They obtained a temporary injunction from the circuit court restraining the plaintiff and officers from proceeding further with the levy until its legality could be determined. Then to better conserve the rights of the beneficiary in the policy, as the lawyers thought, suit was filed against the company on the policy although the company was ready and willing to pay the beneficiary but was being prevented from doing so by the prior legal proceedings. Then the insurance company employed a lawyer and filed an inter-plea for permission to pay the money into court and be discharged from any further litigation and let the court decide who was entitled to it. At the time we go to press, no other suit has been filed.

The "Henry" part of the suit is as follows: It was started before "Henry" Weeks, justice of the peace. The papers were served by "Henry" Lownsdale, constable. The defendant's lawyers are "Henry" Hyslop of Dexter, and "Henry" Phillips of Bloomfield. The insurance company's lawyer is "Henry" Walker of Kennett.

—Reprint from the Campbell, Mo., Citizen.

Happy Days. Here is an example of the conversation that takes place when a crowd of ten or twelve Cleveland lawyers in Columbus for a mid-winter meeting of the Ohio State Bar Association, go out to dinner:

First Lawyer (throwing out his chest): "Do you know, sir, that I was a student at Ohio State University in the Law School before a majority of you boys here at this table were born? I'm a patriarch, I am."

Second Lawyer: "Did you ever hear of the story about how to tell the sex of sardines?" Nobody had. Then followed a lot of guesses but with no explanation being offered.

Third Lawyer: "I wish to pronounce an enconium on the great work that is being done at this convention." Some of the boys at the table said they never heard of such a word as enconium. During the conversation which followed, everybody with the exception of the one who pronounced the word agreed that there was no such word as enconium, at least in the English language. The person present who insisted it was encomium was laughed down.

Fourth Lawyer: This man started lamenting because of the fact that he was to make a speech before the Cleveland Bar Association. He started to plead lack of time to devote to the preparation of his talk. Press of business was given as the reason for his hesitancy about arising before his brethren. All the others at the table pounced on him. "You've got an inferiority complex," shouted one. "You know your own ability will not equal that of your audience," said another. And still another, "Why, you've been maneuvering for five years to get this place on the Bar program."

—The Journal, Cleveland Bar Ass'n.

Maybe Pay the Bill. Collector: "How many times must I climb three flights of stairs to collect this bill?

Debtor: "What do you expect to me do? Hire a place on the first floor to accommodate my creditors?"—*From The Rail.*

Genius What Am. "Dad, it says here that a certain man was a financial genius. What does that mean?"

"That he could earn money faster than his family could spend it."

—From The Rail.

Assumption. The American Automobile Association says a man can park a car properly, but that a woman cannot. How does the A.A.A. know? Has any woman ever tried to park a car properly?

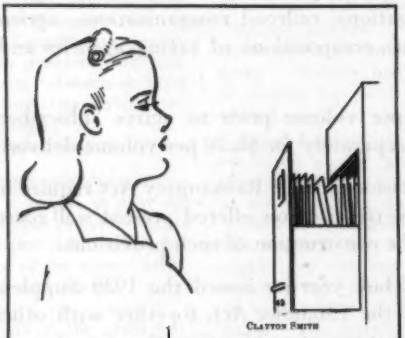
—Washington Post.

A Fair Surmise. "May I ask you prospective members of the jury whether you have ever been guilty of assault, cutting to wound or if any of you have ever been killed?"

Mr. Frey paused for a moment to let the full significance of this question sink into the minds of the jury and then he followed with this comment:

"I take it by your silence that not a single one of you has ever been killed."

—The Journal, Cleveland Bar Ass'n.



There is no use in taking this complaint to the courthouse. I can FILE it myself in our own files

Pal. Jim Thurber, the cartoonist, was served with a summons intended for his brother, John Thurber. Jim therefore had to go to court and prove that he is Jim and not John. He took the stand, admitted that he had no birth certificate, but offered his driver's license and two letters addressed to him. At that moment Robert Benchley, who was to be his identifying witness, entered the room, waved to Jim seated in the witness chair and greeted: "Har'ya, John!"

—Leonard Lyons in New York Post.

Tact. A seemingly stupid young fellow was being bullied in cross-examination. "Do you ever work?" demanded the attorney.

"Not much," the witness agreed.

"Have you ever earned as much as $10 in one week?"

"Ten dollars? Yeah. A couple of times."

"Is your father regularly employed?"

"Nope."

"Isn't it true that he's a worthless good-for-nothing, too?"

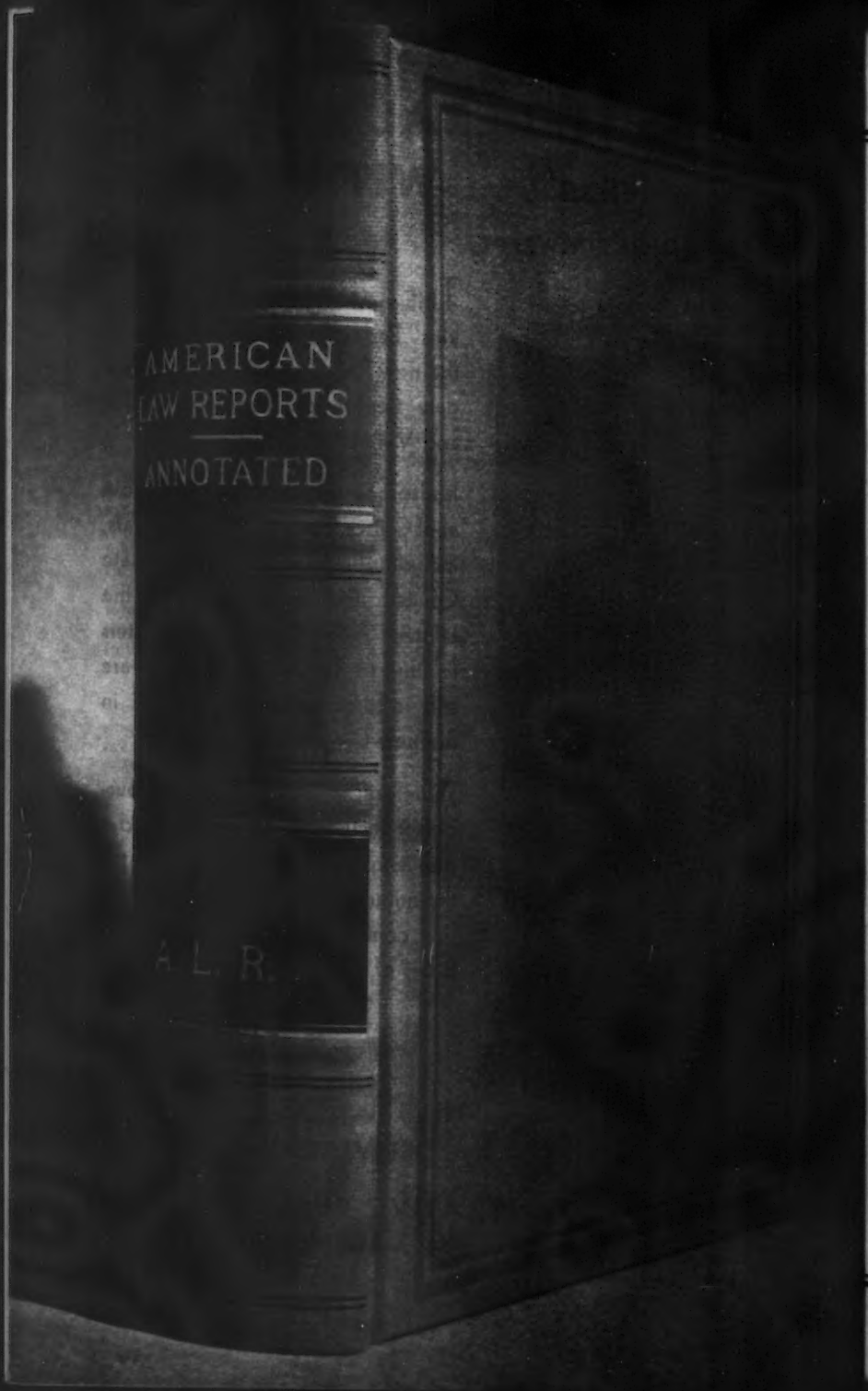
"I don't know about that," said the witness. "But you might ask him. He's sittin' there on the jury."*—American Magazine.*

A Needed Reform. An old woman who had lived with her husband many years consulted one of our young attorneys in regard to obtaining a divorce. She stated that her husband had deserted her, but she did not care so much about that; that he had not supported her properly, but she did not care so much about that; that he had sometimes been cruel to her, but she did not care so much about that; that he sometimes had used abusive language to her, but she did not care so much about that; but, she said, "he ain't a Christian." The young man was rather perplexed, and carried the matter to his preceptor, who, having heard the statement of the case, advised that instead of bringing an action for divorce, he bring an action for conversion.

Convicted. Recently a prisoner pleaded guilty of larceny and then withdrew the plea, and declared himself to be innocent. The case was tried, and the jury acquitted him. Then the judge said:

"Prisoner, a few minutes ago you said you were a thief. Now the jury say you are a liar. Consequently, you are discharged."

A Bit of Fun. Law students at the University of Adelaide received this advice: "If a judge makes a joke laugh at it, no matter how feeble it is. The feebler the joke the louder you should laugh. As a matter of fact, if the joke is very feeble, continue your address, and then be overcome with laughter again. But do not make a joke. The judge might consider it an encroachment on his privileges.—*Bench and Bar.*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